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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 28

CITIES SERVICE OIL COMPANY, PETITIONER,

vs.

B. P. DUNLAP ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 6, 1939.

CERTIORARI GRANTED MAY 1, 1939.

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UNITED STATES OF AMERICA
UNITED STATES CIRCUIT COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT

PLEAS AND PROCEEDINGS had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in November, A. D. 1938, at Fort Worth, Texas, before the Honorable Samuel H. Sibley, the Honorable Edwin R. Holmes and the Honorable Leon McCord, Circuit Judges:-

CITIES SERVICE OIL COMPANY,
Appellant,

versus

B. P. DUNLAP, ET AL.,
Appellees.

BE IT REMEMBERED, That heretofore, to-wit, on the 8th day of July, A. D., 1938, a transcript of the record in the above styled cause, pursuant to an appeal from the District Court of the United States for the Eastern District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 8863, as follows, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

No. 8863.

CITIES SERVICE OIL COMPANY, (FORMERLY EMPIRE OIL AND REFINING COMPANY), SUBSTITUTED AS COMPLAINANT IN LIEU OF EMPIRE GAS & FUEL COMPANY,

Appellant,

versus No. 803 In Equity.

B. P. DUNLAP, ET AL.,

Appellees.

Appeal from the District Court of the United States, for the Eastern District of Texas.

CAPTION.

BE IT REMEMBERED, that at a regular term of the District Court of the United States in and for the Eastern District of Texas, in the Tyler Division thereof, Fifth Circuit, the Honorable Randolph Bryant, a United States District Judge, then and there presiding, held a session of said Court at the City of Tyler, Texas; that said term of Court began on the 10th day of February, A. D. 1936, and continued to and terminated by operation of law on the 3rd day of October, A. D. 1936; that during said term of Court there came on to be heard, on the 27th day of April, A. D. 1936, this cause and the trial of said cause continued from day to day, whereupon, at the conclusion of the evidence the Court announced that he would take said cause under advisement and enter a decree at a later date. Whereupon, the Court took said cause under consideration and thereafter, at a regular term of said Court begun and holden at Tyler, Texas, on the 14th day of February, A. D. 1938, which said term has not yet terminated, the Court, on the 30th day of April, A. D. 1938, entered a decree in the following cause:

Empire Gas & Fuel Company, (Cities Service Oil Company, formerly Empire Oil & Refining Company, Substitute Complainant),

vs. #803 In Equity.

B. P. Dunlap, et al.

---

2 BILL OF COMPLAINT.

In the District Court of the United States for the Eastern District of Texas, Tyler Division.

Empire Gas & Fuel Company,

vs. No. 803 In Equity.

B. P. Dunlap, et al.

To the Honorable Randolph Bryant, Judge:

Empire Gas & Fuel Company, a private corporation, duly incorporated under the laws of the State of Maine, and a citizen, resident and inhabitant of such state, doing business in Texas under and by virtue of a permit duly issued by the Secretary of State, with an office and agent in Gregg County, Texas, plaintiff, complains of the hereinafter named defendants, each a resident, citizen and inhabitant of the County and State immediately following his name, to-wit: B. P. Dunlap, Dallas County, Texas, F. E. Rogers, Gregg County, Texas, W. H. Rogers, Gregg County, Texas, Mrs. L. J. Rogers, Gregg County, Texas, J. E. Rogers, Gregg County, Texas, and wife, Ola Mae Rogers, Gregg County, Texas, Elvie (Rogers) Waskom, Gregg County, Texas, and husband, Azzie Waskom, Gregg County, Texas, J. R. Bozman, Gregg County, Texas, and wife, Olga Bozman, Gregg County, Texas, J. T. Brewer, Taylor County, Texas, and wife, Garnett Brewer, Taylor County, Texas, B. F. Phillips, Gregg County, Texas,

Curtis M. Willock, Pasadena, California, and J. B. Parker, Jena, Louisiana; and for cause of action plaintiff says:

I.

A diversity of citizenship exists in this cause entitling plaintiff to sue in that plaintiff is a corporation
3 incorporated under the laws of the State of Maine and a citizen, resident and inhabitant of such state as hereinbefore set forth, and the defendants are each and all residents, citizens and inhabitants of states other than the state of Maine, and a part of said defendants reside in the Tyler Division of the Eastern District of this Honorable Court, and the land here in controversy is situated in Gregg County, Texas, within this division of this Honorable Court. The amount in controversy exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs, in that the oil, gas and mineral estate owned by plaintiff, hereinafter more particularly alleged insofar as same covers the acreage in controversy in the tracts hereinafter described, is worth far in excess of Three Thousand Dollars ($3,000.00), and such estate herein sought to be established and the title thereto quieted is of a reasonable cash market value greatly in excess of the sum of Three Thousand Dollars ($3,000.00) exclusive of interest and costs, and the mineral interest claimed by the defendants and sought to be recovered by the plaintiff and its title thereto quieted is of the reasonable cash market value in excess of Three Thousand Dollars ($3,000.00), and the oil and gas which will be removed from said land by defendants unless plaintiff is granted the relief herein sought will far exceed the reasonable market value of Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

II.

Heretofore on February 28, 1899, by deed recorded in Volume R, page 59, of the Deed Records of Gregg Coun-

ty, Texas, J. W. Rogers, W. H. Rogers and F. E. Rogers conveyed to J. F. Rogers all that certain tract or parcel of land situated in Gregg County, Texas, being a part of the Geo. A. Thomason Survey,

Starting at the N. E. corner of Lot No. 2 which is the N. W. corner of W. H. Rogers tract Lot 1;

Running West 440 yards to Wiley Davis N. E. corner;

Thence South 880 yards;

Thence East 224 yards;

Thence North 310 yards at 12 deg. East of North;

Thence East 154 yards to W. H. Rogers line;

Thence North 572 yards to starting point, containing 68-1/5 acres, more or less.

the parties to said deed having theretofore owned said land, and other lands, and said deed and other deeds of the same date having effected a partition thereof. Thereafter by deed dated May 7, 1917, filed in the office of the Clerk of Gregg County, Texas, on May 10, 1917, and recorded in Vol. 32, page 563; of said Records, Mrs. L. J. Rogers, Elvie Waskom and husband, Azzie Waskom, and J. E. Rogers conveyed to J. W. Mings all that certain lot or parcel of land in Gregg County, Texas, a part of the said G. A. Thomason H. R. Survey.

Beginning at the N. W. corner of our 68-acre tract, said beginning corner is about 953 vrs. West of the N. E. corner of said G. A. Thomason H. R. Survey;

Thence East 147 feet to corner on the N. B. line of G. A. Thomason Survey, witness P. O. tree about 12 in. diam. brs. W. 5 feet;

Thence South with fence 757 feet to corner, said corner being 21 feet S. E. of S. E. corner of residence;

Thence West 115 feet to E. side of Union Grove Public Road, witness B. J. tree brs. N. about 10 deg. East 75 ft.

Thence with meanderings of said road to the place of beginning, containing about two acres of land, more or less.

Subsequent to February 28, 1899, and prior to May 7, 1917, the said J. F. Rogers died intestate, leaving surviving him his wife, Mr. L. J. Rogers, and two children, the said Elvie Waskom and J. E. Rogers, as his sole surviving heirs at law, and no administration was had upon his estate and no necessity existed therefor. On the date of October 20, 1930, the said Mrs. L. J. Rogers, F. E. Rogers and Elvie Waskom owned and claimed and were in possession of the hereinafter described land as being the property described in said deed from J. W. Rogers, W. H. Rogers and F. E. Rogers (except said two acres) as well as by virtue of the statutes of limitation of the State of Texas of five, ten and twenty-five years,
5 they and their predecessors in title having for a period of more than twenty-five consecutive years held, used, cultivated and occupied said hereinafter described tract of land, paying taxes thereon and claiming the same in good faith under deeds purporting to convey the same duly registered in the Deed Records of Gregg County, Texas, such use being open, notorious, continuous, peaceable and adverse to the whole world, such land so possessed being actually and more particularly described as follows:

Being a part of the G. A. Thomason headright, situated in Gregg County, Texas.

Starting at the N. E. corner of Lot No. 2, which is the N. W. corner of the W. H. Rogers tract No. 1,

Thence N. 89 44′ W. a distance of 1228.19 ft. to N. E. corner of 2-acre tract above described.

Thence S. 0 56′ W. a distance of 726.32 ft. to S. E. corner of said 2-acre tract,

Thence S. 80 59′ W. a distance of 118.34 ft. to S. W. corner of said 2-acre tract on Clark's E. line,

Thence S. 1 03′ E. a distance of 1919.14 ft. to King's N. W. corner on Haynes' E. B. line,

Thence N. 89 30′ E. a distance of 738.89 ft.,

Thence N. 10 36′ E. a distance of 940.45 ft.,

Thence N. 88 31′ E. a distance of 462.24 ft.,

Thence N. 1 29′ W. a distance of 1715.64 ft. to the point of beginning said tract to contain 66-1/5 acres, more or less.

It being the intention of the Lessor herein to lease all land owned by them in said survey.

On said date of October 20, 1930, L. J. Rogers, J. E. Rogers, A. S. Waskom (who is one and the same person as Azzie Waskom), and his wife, Elvie Waskom, by their certain oil, gas and mineral lease granted and conveyed to W. P. Chandler all of the oil, gas and minerals in, on and under the tract of land last above described, said lease containing the description of the 66-1/5 acres first above contained and excepting said 2-acre tract, and thereafter stating "it being the intention to include all land owned or claimed by lessor in said surveys," which said lease was duly filed for record in the office of the Clerk of Gregg County, Texas, on November 18, 1930, and recorded in Volume 61, page 295 of the Deed Records of

said county. By assignment and conveyance
6 plaintiff became on October 21, 1930, the owner of said oil, gas and mineral leasehold estate and immediately went into possession thereof, and in conformation of said lease, said lessors and Ola Mae Rogers, wife of the said J. E. Rogers, executed to plaintiff another lease dated May 8, 1931, now recorded in Volume 84, page 516 of said Deed Records, and plaintiff is now the owner and in possession thereof and of all of the oil, gas and minerals in and under the land last above described, subject to the payment of the rentals and royalties provided to be paid by said lease, all of which have been paid in accordance with the terms thereof.

III.

Long subsequent to the leases to W. P. Chandler and plaintiff hereinbefore stated, and long subsequent to the vesting of the rights of plaintiff and its predecessors in title in and to its said oil, gas and mineral leasehold estate, defendant, B. P. Dunlap, secured from F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers and wife, Ola Mae Rogers, and Elvie (Rogers) Waskom, a purported oil, gas and mineral lease dated October 10th, 1934, filed in the office of the Clerk of Gregg County, Texas, on October 19th, 1934, recorded in Volume 170, page 602 of the Deed Records of said County, purporting to convey to the said Dunlap the leasehold estate in a tract of land between the west line of the J. F. Rogers Tract of land as surveyed in the year 1899, the east line of the G. W. Clark and M. P. Haynes tracts or some other tract well known to defendants, and while plaintiff does not admit but expressly denies that any such tract of land in fact exists, yet if there be such tract of land the title to the oil, gas and mineral leasehold estate in and to the same is owned by plaintiff by virtue of the facts hereinbefore alleged, said purported tract being described in said lease as follows:

7 Beginning at an old steel shaft about 2" in diameter with an old bevel gear wheel on upper

end, as a land mark stake set for the W. N-W. corner of a 176 acre tract of land and the S-W. corner of the J. F. Rogers tract of land by the surveyor on the ground in the year 1899;

Thence Northerly along the W. B. line of said J. F. Rogers tract of land to the N-W. corner thereof on the N. B. line of the said headright survey a distance of about 880 yards;

Thence West 66.89 feet to the N-E. corner of the Clark land which is also the N-W. corner of the Alexander Rogers original tract of land prior to the junior surveys thereof made in the year 1899;

Thence Southerly 880 yards along the East boundary lines of the Clark land and the Haynes land, which is also the West boundary line of the said Alexander Rogers land, to a 1¼" iron pipe stake set in the West boundary line of the said Alexander Rogers tract of land, the same being the S-W. corner of this tract;

Thence East 66.89 feet to the place of beginning and containing five (5) acres of land, more or less.

Save and except about 2 acres of land conveyed to J. W. Mings by Mrs. L. J. Rogers, et al., by deed dated May 7, 1917, and recorded in Volume 32, page 564, Deed Records of Gregg County, Texas.

In said lease, the lessors retained an oil payment of Twenty-five Hundred Dollars ($2500.00) per well, payable out of one-eighth of seven-eighths (1/8 of 7/8) of the oil produced from said purported tract.

Defendant, J. T. Brower, secured an oil, gas and mineral lease covering the same purported tract of land and other land from J. R. Bozman and wife, Olga Bozman, dated August 2, 1934, filed in said office August 8, 1934.

and recorded in Volume 168, page 573 of said Records, said lease containing as a description of the land covered thereby the following:

Situated in the George A. Thomason Survey, Gregg County, Texas, about two (2) miles East of the Town of Gladewater, Texas, and being a strip of land approximately sixty (60) feet east and west, and approximately three thousand five hundred (3,500) feet north and south, lying east of and immediately adjacent to that certain 202-acre tract of land known as the J. M. Haynes tract of land as described in that certain deed from J. R. Bozeman and Olga Bozeman to J. M. Haynes, dated June 22, 1917, and recorded in Volume 33, at page 74 of the Deed Records of Gregg County, Texas, to which reference is here made.

8 As further consideration for the execution of this oil and gas lease, lessee agrees to, at his own cost and expense, clear the title to the stript of land herein conveyed, and use his best efforts to make the title thereto merchantable; lessee further agrees to immediately have said strip of land surveyed in order to determine the exact boundaries of same as well as the exact number of acres comprized therein, and in this connection it is the intention of the lessors herein that this oil and gas lease shall cover the tract of land included within said survey to be made by lessee, whether the lines and boundaries of same are longer or shorter than as herein approximately stated; in the event lessee is successful in effecting a good and merchantable title to said tract of land, he agrees to drill and complete a well thereon for the production of oil and gas as soon as practicable after perfection of a merchantable title.

It is understood and agreed by and between the undersigned that upon completion of a producing well on the tract of land herein mentioned, that the oil royalty under said well shall be owned by J. R. Bozeman & wife, Olga

Bozman. It being the intention to include all land owned or claimed by Lessor in said survey or surveys whether correctly above described or nor.

By assignment dated September 22, 1934, filed in said office September 28, 1934, recorded in Volume 170, page 388 of said Deed Records, the said J. T. Brewer conveyed said purported lease to defendant, B. F. Phillips, and Brewer retained an oil payment of Fifteen Thousand Dollars ($15,000.00), to be paid out of five-thirty-seconds of seven-eighths (5/32 of 7/8) of the oil produced from said land, described in said assignment as follows:

Being a narrow strip of land lying between the land now owned by *J. L.* Rogers on the East and the land of J. M. Haynes on the West, and located in the Geo. A. Thomason Survey, about two miles East of the town of Gladewater, Texas, and described by metes and bounds as follows:

Beginning at an iron stake set for the southwest corner of the said *L. J.* Rogers 70-acre tract in the Geo. A. Thomason survey in Gregg County, Texas;

Thence North with the west line of the said Rogers tract 1190 ft. to a stake set in the south right of way line of the Longview and Gladewater highway;

Thence North approximately 70 deg. West with the south line of the said highway 32 ft. to a stake for the northwest corner of this tract and the northeast corner of the Haynes tract;

Thence south with the said Haynes East boundary line 3030 ft. to an iron stake by an old pine knot set for the most eastern southeast corner of the said Haynes tract and the northeast corner of the Mrs. M. C. Sheppard 36-acre tract;

Thence North 1 deg. East 1830 ft. to the place of beginning, and containing 1.42 acres of land more or less, which said oil and gas lease is recorded in the Deed Records of Gregg County, Texas, under file register #7603.

And said Brewer was to be paid the further sum of Twenty-three Hundred Dollars ($2300.00) upon the spudding in of the first well on said purported tract. By further assignment dated November 17, 1934, recorded in Volume 174, page 56 of said Records, the said J. T. Brewer confirmed said assignment to B. F. Phillips and assigned to his wife, Garnett Brewer, all his purported right, title and interest in said purported tract except Two Thousand Dollars ($2,000.00), to be paid out of one-thirty-second of seven-eighths (1/32 of 7/8) of all the oil saved, sold and produced. And the said defendants have been actively engaged since the respective dates of said leases and assignments in asserting title to said purported tracts of land and in attempting to drill a well and wells for oil and gas thereon, claiming that said purported tracts of land cover approximately five (5) acres off the West side of plaintiff's oil, gas and mineral lease. Said defendants, or one or more of them, their relation being well known to themselves but not to plaintiff, are now commencing operations for drilling and are erecting a derrick for the purposes of drilling a well for oil and/or gas upon said approximate five acres and upon plaintiff's lease and are proceeding to drill a well for oil and gas thereon, all without right and unless prevented by injunction will drill said well to production and take and remove large quantities of oil and gas from said property and convert the same to their own use to plaintiff's great and irreparable damage and injury. Said instruments to and from the said Dunlap and Brewer and claims of the defendants and their activities as aforesaid and the record of said instruments cast clouds upon plaintiff's title to its said property and greatly damage and depreciate

the value of plaintiff's mineral estate, and plaintiff is without adequate remedy at law.

IV.

The defendants Curtis M. Willock and J. B. Parker own interests in the minerals in and under said land, subject to plaintiff's lease, and in the royalties payable by the terms of said lease, and should be required to plead herein and set up their rights to the land in controversy herein. In this connection, plaintiff shows that each of the defendants and their predecessors in title have executed instruments admitting that plaintiff's lease covers said purported strips of land, and plaintiff has relied thereon and spent over Fifty Thousand Dollars ($50,000.00) in the development of said land for oil and gas, which program of development was carried out upon the facts so represented to plaintiff, and if such strips be held to exist and not owned by plaintiff, plaintiff would now be required to drill further wells at a cost of more than Ten Thousand Dollars ($10,000.00) each, and such further wells are wholly unnecessary to adequately and economically recover all of the oil underlying plaintiff's lease. By reason thereof, defendants and each of them have ratified plaintiff's lease as covering said purported strips, and are estopped to assert that such purported strips are not covered by plaintiff's lease.

V.

Plaintiff further shows that said purported strips of land in controversy herein have been used by the public, including plaintiff, as a road for more than twenty-five years next preceding the filing of this suit, and said strips are burdened with an easement for road purposes in favor of the public, and the drilling of oil and gas wells thereon by defendants and each of them will deprive plaintiff and other members of the public of their right

to use said road and will interfere with the use of said road by plaintiff, to which use plaintiff is entitled.

11 Wherefore, plaintiff sues and prays that the defendants, and each of them, be cited to appear and answer in this behalf, that upon hearing hereof plaintiff recover the title and possession of its said property and be quieted in the title and possession thereof as against each and all of the defendants, that the clouds cast by the claims and operations of the defendants and the instruments under which they claim and the records thereof be removed therefrom and the defendants adjudicated to own no right, title or interest therein or thereto, and in the alternative, that said strips be adjudicated a public road and defendants denied the right to drill wells for oil and gas thereon or to produce oil and gas therefrom; and that plaintiff recover its costs and such other relief, general and special, as it may be entitled to under the premises. Pending a hearing hereof, plaintiff prays for temporary injunction restraining the defendants, and each of them, their agents and employees, successors and assigns, from drilling or developing the purported approximate five acres or any part of plaintiff's property for oil and/or gas and from further interfering with plaintiff and its possession, use and development of the aforesaid premises, and that upon trial hereof such injunction be made permanent.

PHILLIPS, TRAMMELL, CHIZUM,
ESTES & EDWARDS,
CECIL N. COOK,
JOE E. ESTES,
Attorneys for Plaintiff.

Bill of Complaint—Filed December 18, 1934.

MOTION OF DEFENDANT B. P. DUNLAP TO DISMISS BILL OF COMPLAINT.

12 (Title Omitted.)

To the Honorable Randolph Bryant, Judge:

Now comes the defendant, B. P. Dunlap, and moves that the Court dismiss the complainants bill for the reason that the same shows upon its face that it is without equity.

Said defendant further moves that said bill be dismissed for the reason that it appears that the bill is brought in the guise of a suit to remove cloud from title, and there is no express allegation that the plaintiff is in possession of the property; but, to the contrary, it affirmatively appears from the face of the bill that they are not in possession—the prayer of the bill being for title and possession.

The said defendant further moves that the bill be dismissed for the reason that it appears from the face of the bill that there is a misjoinder of causes of action, in that two separate and distinct tracts of land are involved, owned and claimed by separate and distinct parties defendant.

Defendant further moves that the bill be dismissed for the reason that there is a misjoinder of parties defendant, for the reason that it appears from the face of the bill that there is no connection between the claim of the defendant Brewer, holding under the Bozman title, and the other defendants holding under the Rogers title.

Wherefore, this defendant prays that the bill be dismissed.

WYNNE & WYNNE,
Attorneys for Defendant,
B. P. Dunlap,
By W. A. WADE.

Filed January 16, 1935.

MOTION OF DEFENDANTS J. T. BREWER, ET AL., TO DISMISS BILL OF COMPLAINT.

13 (Title Omitted.)

To the Honorable Randolph Bryant, Judge of said Court:

Come now the defendants, J. T. Brewer and wife, Garnett Brewer, B. F. Phillips, and J. R. Bozman and wife, Olga Bozman, and move that this Honorable Court dismiss the Bill of Complaint filed herein as against them and for good cause would show the following:

(a) That the same does not state any matter of equity entitling the plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against these defendants.

(b) That the plaintiff herein is not in possession of said tract of land, therefore cannot be heard in a Bill to quiet title against those in possession because said plaintiff has a full, adequate and complete remedy at law and that the defendants are entitled to a jury trial.

(c) That it appears on the face of the Bill that the real purpose of this suit is to try the title to the land in controversy and from the facts alleged the title to the land is put in issue and a bill in equity in the nature of one to remove cloud from title is not the proper remedy to determine a controversy between the parties as to the title to the real estate owned and claimed by these defendants.

(d) Because the plaintiff has an adequate and sufficient remedy at law; that it is not within the jurisdiction of equity to adjudicate upon conflicting titles of parties to real estate and since it appears from the face of the Bill that the title to the tract of land which is owned and claimed by these defendants is not in the chain of title to the plaintiff, nor a part thereof, and that

it is not only incumbent upon the plaintiff to allege that it is in possession of the property but that its
14 title has been established at law by at least one successful suit, and since it has not made any such allegations the Bill should be dismissed.

Wherefore, premises considered, the defendants and each of them pray the judgment of this Court whether they or either of them shall further answer, and that they and each of them be dismissed with their costs.

CAMPBELL & LEAK,
Attorneys for defendants, J. T. Brewer, Garnett Brewer, B. F. Phillips, J. R. Bozman and Olga Bozman.

Filed Jan. 25, 1935.

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15 MOTION OF DEFENDANTS F. E. ROGERS, ET AL., TO DISMISS BILL OF COMPLAINT.

(Title Omitted.)

To the Honorable Randolph Bryant, Judge:

Now come the defendants F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers, Ola Mae Rogers, Elvie (Rogers) Waskom and Azzie Waskom and move that the Court dismiss the complainants bill for the reason that the same shows upon its face that it is without equity.

Said defendants further move that said bill be dismissed for the reason that it appears that the bill is brought in the guise of a suit to remove cloud from title, and there is no express allegation that the plaintiff is in possession of the property; but, to the contrary, it affirmatively appears from the face of the bill that they are not in possession—the prayer of the bill being for title and possession.

The said defendants further move that the bill be dismissed for the reason that it appears from the face of the bill that there is a misjoinder of causes of action in that two separate and distinct tracts of land are involved, owned and claimed by separate and distinct parties defendant.

Defendants further move that the bill be dismissed for the reason that there is a misjoinder of parties defendant, for the reason that it appears from the face
16 of the bill that there is no connection between the claim of the defendant Brewer, holding under the Bozman title, and the other defendants holding under the Rogers title.

Wherefore, these defendants pray that the bill be dismissed.

WYNNE & WYNNE,
Attorneys for said named Defendants,
By W. A. WADE.

Filed March 21, 1935.

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17 ORDER OF DISMISSAL AS TO DEFENDANTS J. T. BREWER, ET AL.

(Title Omitted.)

On this May 13, 1935, before the Court in session came the plaintiff and stated to the Court that it was of opinion that in view of the plea of misjoinder of the defendants, J. T. Brewer and wife, Garnett Brewer, B. F. Phillips and J. R. Bozman and wife, Olga Bozman, it desired to dismiss its suit as against said defendants without prejudice and no objection being made thereto, it is

Ordered, Adjudged and Decreed that plaintiff's suit be and it is hereby dismissed as to the defendants, J. T. Brewer and wife, Garnett Brewer, B. F. Phillips, and J. R. Bozman and wife, Olga Bozman, without prejudice, at plaintiff's cost, this dismissal, however, not to affect plaintiff's right to hereafter bring suit against said defendants in any other proceeding or Court, and to be without prejudice to plaintiff's suit herein as against the remaining defendants.

RANDOLPH BRYANT,
Judge.

Filed May 18, 1935.

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18 WAIVER OF SUBPOENA BY CURTIS M. WILLOCK, ET AL.

(Title Omitted.)

The defendants, Curtis M. Willock and J. B. Parker, acknowledge receipt of a copy of the original bill of complaint filed herein by Empire Gas & Fuel Company and enter their appearance in this cause as fully as if they had been served with subpoenas herein.

CURTIS M. WILLOCK, and
J. B. PARKER,
By CECIL N. COOK,
Attorney of Record.

Filed as of January 10, 1935.

19 MOTION OF COMPLAINANT FOR LEAVE TO FILE AMENDED BILL.

(Title Omitted.)

To the Honorable Randolph Bryant, Judge:

Empire Gas & Fuel Company respectfully shows that since the institution of this suit there have been certain of the defendants dismissed therefrom, rendering the allegations in the original petition as to such defendants and their claims surplusage, and that it is necessary for such reason, and in order to properly and adequately state plaintiff's rights and cause of action, to file an amended bill herein, which amended bill is herewith presented. Counsel for defendants have, prior to the filing hereof, been furnished with a copy of such amended petition.

Wherefore, plaintiff prays for the entry of an order granting it leave to file such petition and that such further proceedings be had herein as equity may require.

PHILLIPS, TRAMMELL, CHIZUM, ESTES & EDWARDS,
HARRY O. COWING, JR.,
DAVID B. TRAMMELL,
Attorneys for Plaintiff.

Filed January 11, 1936.

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20 ORDER GRANTING COMPLAINANT LEAVE TO FILE AMENDED BILL.

(Title Omitted.)

On this January 11th, 1936, before the Court in session, came on to be heard the application of plaintiff for leave

to file amended bill, and such motion being heard, it is hereby granted and the Clerk hereof is hereby directed to file the amended petition accompanying such motion.

RANDOLPH BRYANT,
Judge.

Filed January 11, 1936.

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21 AMENDED BILL OF COMPLAINT.

(Title Omitted.)

To the Honorable Randolph Bryant, Judge:

Empire Gas & Fuel Company, a corporation, incorporated under the laws of the State of Maine, and a citizen, resident and inhabitant of such state, transacting business in Texas under a permit, with an office and agent in Gregg County, Texas, complaining of B. P. Dunlap, a citizen, resident and inhabitant of Dallas County, Texas, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers; Elvie (Rogers) Waskom and her husband, Azzie Waskom, all citizens, residents and inhabitants of Gregg County, Texas, Curtis M. Willock, a citizen, resident and inhabitant of Pasadena, California, and J. B. Parker, a citizen, resident and inhabitant of Jena, Louisiana, all defendants, with leave of Court, files this its First Amended Original Petition, and for cause of action respectfully represents:

I.

A diversity of citizenship exists in this cause entitling plaintiff to sue in that plaintiff is a corporation incorporated under the laws of the State of Maine and a citizen, resident and inhabitant of such state as hereinbefore set forth, and the defendants are each and all residents,

citizens and inhabitants of states other than the state of Maine, and a part of said defendants reside in the Tyler Division of the Eastern District of this Honorable Court, and the land here in controversy is situated in
22 Gregg County, Texas, within this division of this Honorable Court. The amount in controversy exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs, in that the oil, gas and mineral estate owned by plaintiff, hereinafter more particularly alleged insofar as same covers the acreage in controversy in the tracts hereinafter described, is worth far in excess of Three Thousand Dollars ($3,000.00), and such estate herein sought to be established and the title thereto quieted is of a reasonable cash market value greatly in excess of the sum of Three Thousand Dollars ($3,000.00) exclusive of interest and costs, and the mineral interest claimed by the defendants to which plaintiff seeks to quiet its title is of the reasonable cash market value in excess of Three Thousand Dollars ($3,000.00), and the oil and gas which will be removed from said land by defendants unless plaintiff is granted the relief herein sought will far exceed the reasonable market value of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

II.

Heretofore on February 28, 1899, by deed recorded in Volume R, page 59, of the Deed Records of Gregg County, Texas, J. W. Rogers, W. H. Rogers and F. E. Rogers conveyed to J. F. Rogers all that certain tract or parcel of land situated in Gregg County, Texas, being a part of the Geo. A. Thomason Survey,

Starting at the N. E. Corner of Lot No. 2 which is the N. W. Corner of W. H. Rogers tract, Lot 1;

Running West 440 yards to Wiley Davis N. E. corner;

Thence South 880 yards;

Thence East 224 yards;
Thence North 310 yards at 12 deg. East of North;
Thence East 154 yards to W. H. Rogers line;
Thence North 572 yards to starting point, containing 68-1/3 acres, more or less;

23 the parties to said deed having theretofore owned said land, and other lands, and said deed and other deeds of the same date having effected a partition thereof. At the time such deed was executed the Wiley Davis northeast corner was a well established corner, located and established on the ground, and a road had been established along such common line running southward to and across the public road and along the line between the Bozeman (now the Haynes) east line and the Rogers west line south of said road. Such Wiley Davis northeast corner at that time existed in such road, and such deed was intended to and did convey to said J. F. Rogers the tract of land joining the Wiley Davis tract at its northeast corner and running south with such Davis tract and the west line of the tract now owned by J. M. Haynes to the southwest corner of said J. F. Rogers tract as set forth in such deed.

III.

By deed dated May 7, 1917, filed in the office of the Clerk of Gregg County, Texas, on May 10, 1917, and recorded in Vol. 32, page 563 of said Records, Mrs. L. J. Rogers, Elvie Waskom and husband, Azzie Waskom, and J. E. Rogers conveyed to J. W. Mings all that certain lot or parcel of land in Gregg County, Texas, a part of the said G. A. Thomason H. R. Survey.

Beginning at the N. W. Corner of our 68-acre tract, said beginning corner is about 953 vrs. West of the N. E. corner of said G. A. Thomason H. R. Survey;

Thence East 147 feet to corner on the N. B. line of G. A. Thomason Survey, witness P. O. tree about 12 in. dia., brs. W. 5 feet;

Thence South with fence 757 feet to corner, said corner being 21 feet S. E. of S. E. corner of residence;

Thence West 115 feet to E. side of Union Grove public road, witness B. J. tree brs. N. about 10 deg. East 75 ft.

Thence with meanderings of said road to the place of beginning, containing about two acres of land, more or less.

Subsequent to February 28, 1899, and prior to May 7, 1917, the said J. F. Rogers died intestate, leaving surviving him his wife, Mrs. L. J. Rogers, and two children, the said Elvie Waskom and J. E. Rogers, as his
24 sole surviving heirs at law, and no administration was had upon his estate and no necessity existed therefor. On the date of October 20, 1930, the said Mrs. L. J. Rogers, F. E. Rogers and Elvie Waskom owned and claimed and were in possession of the hereinafter described land as being the property described in said deed from J. W. Rogers, W. H. Rogers and F. E. Rogers (except said two acres above described) as well as by virtue of the statutes of limitation of the State of Texas of five, ten and twenty-five years, they and their predecessors in title having for a period of more than twenty-five consecutive years held, used, cultivated and occupied said hereinafter described tract of land, paying taxes thereon and claiming the same in good faith under deeds purporting to convey the same, duly registered in the Deed Records of Gregg County, Texas, such use being open, notorious, continuous, peaceable and adverse to the whole world.

IV.

On said date of October 20, 1930, L. J. Rogers, J. E. Rogers, A. S. Waskom (who is one and the same person as Azzie Waskom), and his wife, Elvie Waskom, by their certain oil, gas and mineral lease granted and conveyed to W. P. Chandler all of the oil, gas and minerals in, on and under the tract of land last above described, said lease containing the description of the 66 1/5 acres first above contained and excepting said 2-acre tract, and thereafter stating "it being the intention to include all land owned or claimed by lessor in said surveys", which said lease was duly filed for record in the office of the Clerk of Gregg County, Texas, on November 18, 1930, and recorded in Volume 61, page 295 of the Deed Records of said County. By assignment and conveyance plaintiff became on October 21, 1930, the owner of said oil, gas and mineral leasehold estate and immediately went into possession thereof, and in confirmation of said lease, said lessors and Ola Mae Rogers, wife of the said J. E. Rogers,
executed to plaintiff another lease dated May 8,
25 1931, now recorded in Volume 84, page 516 of said Deed Records, and plaintiff is now the owner and in possession thereof and of all of the oil, gas and minerals in and under the said land above described, subject to the payment of the rentals and royalties provided to be paid by said lease, all of which have been paid in accordance with the terms thereof. While the land was described in said confirmation lease as follows:

Being a part of the G. A. Thomason headright.

Starting at the N. E. corner of Lot No. 2 which is the N. W. corner of the W. H. Rogers tract No. 1, thence N. 89 44' W. a distance of 1228.19 ft., thence S. 0 56' W. a distance of 726.32 ft., thence S. 80 59' W. a distance of 118.34 ft., thence E. 1 03' E. a distance of 1919.14 ft., thence N. 89 30' E. a distance of 738.89 ft., thence N. 10 36' E.

a distance of 940.45 ft., thence N. 88 31' E. a distance of 462.24 ft., thence N. 1 29' W. a distance of 1715.64 ft. to the point of beginning said tract to contain 66 1/5 acres more or less.

It being the intention of the Lessor herein to lease all land owned by them in said Survey, and containing 66 1/5 acres, more or less,

it was intended to cover and include all land covered by said original lease, the description of which is hereinabove set out, in paragraph II, and it was in contemplation of the parties at the time, and intended that such confirmation lease should cover and include all of the land owned by said lessors in said common survey, and such provision was embraced in the aforesaid instrument as above copied for such purpose, and called to the attention of the lessors and discussed with them at the time of the execution of such confirmation and correction lease, by reason of which plaintiff shows to the Court that if there is any discrepancy between the two descriptions, and if in fact the description last above copied does not include all of the land covered by the description in paragraph II hereof, nevertheless, the defendant lessors owned all of said land at such time, and it was in a common survey, and all such land was covered and included within the description of such confirmation lease, and was intended to be and was granted and conveyed to plaintiff for the purposes set forth in said oil, gas and mineral lease, such lessors at such time owning
26 the land extending on the west to the land now owned by J. M. Haynes on the south and G. W. Clark on the north, and the oil and gas lease to the defendant Dunlap executed by the defendants Rogers and Waskom, hereinafter referred to, conveyed no title, interest or right to the defendant Dunlap, and vested in the said Dunlap no interest therein.

V.

Long subsequent to the leases to W. P. Chandler and plaintiff hereinabove stated, and long subsequent to the vesting of the rights of plaintiff and its predecessors in title in and to its said oil, gas and mineral leasehold estate, defendant, B. P. Dunlap, secured from F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers and wife, Ola Mae Rogers, and Elvie (Rogers) Waskom, a purported oil, gas and mineral lease dated October 10th, 1934, filed in the office of the Clerk of Gregg County, Texas, on October 19th, 1934, recorded in Volume 170, page 602 of the Deed Records of said County, purporting to convey to the said Dunlap the leasehold estate in a tract of land described in said lease as follows:

Beginning at an old steel shaft about 2" in diameter with an old bevel gear wheel on upper end, as a land mark stake set for the W. N.-W. corner of a 176 acre tract of land and the S. W. corner of the J. F. Rogers tract of land by the surveyor on the ground in the year 1899;

Thence northerly along the W. B. line of said J. F. Rogers tract of land to the N.-W. corner thereof on the N. B. line of the said headright survey a distance of about 880 yards;

Thence West 66.89 feet to the N.-E. corner of the Clark land which is also the N.-W. corner of the Alexander Rogers original tract of land prior to the junior surveys thereof made in the year 1899;

Thence Southerly 880 yards along the East boundary lines of the Clark land and the Haynes land, which is also the West boundary line of the said Alexander Rogers land, to a 1¼" iron pipe stake set in the West boundary line of the said Alexander Rogers tract of land, the same being the S.-W. corner of this tract;

Thence East 66.89 feet to the place of beginning and containing five (5) acres of land, more or less.

Save and except about 2 acres of land conveyed to J. W. Mings by Mrs. L. J. Rogers, et al, by deed dated May 7, 1917, and recorded in Volume 32, page 564, Deed Records of Gregg County, Texas.

27 In said lease, the lessors retained an oil payment of Twenty-five Hundred Dollars ($2500.00) per well, payable out of one-eighths of seventh-eighths (1/8 of 7/8) of the oil produced from said purported tract.

VI.

As hereinabove alleged, the tract of land described in said Dunlap lease was and is covered and included within the land covered by the leases of plaintiff, and said oil and gas lease to said Dunlap vested no right in or to the minerals in or on said land. Nevertheless, by the record of such oil and gas lease defendants have clouded the title to plaintiff's property, and have executed and recorded other instruments in writing further clouding such title, and have applied to the Honorable Railroad Commission of Texas for a permit to drill on such purported strip, and have heretofore threatened and are still threatening to enter thereon and drill a well for oil and gas, and have disturbed plaintiff in the quiet enjoyment of its title to and possession of such property, all to plaintiff's great and irreparable damage, for which plaintiff has no adequate remedy at law, being in possession of such property, and the damages being incapable of exact ascertainment.

Whereupon, plaintiff brings this suit and prays that upon hearing hereof it have judgment quieting its title to and possession of such property, removing the clouds cast upon its title by the record of the aforesaid oil and

gas lease and other instruments affecting the same, restraining the defendants from going upon such property or otherwise hindering or obstructing plaintiff in the use thereof and disturbing its enjoyment of its title and possession; that defendants be further restrained and enjoined from otherwise clouding the title to such property, and that the plaintiff recover its costs and general relief.

PHILLIPS, TRAMMELL, CHIZUM,
28 ESTES & EDWARDS,
HARRY O. COWING, JR.,
DAVID B. TRAMMELL,
Attorneys for Plaintiff.

Amended Bill of Complaint Filed January 11, 1936.

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29 ANSWER AND CROSS ACTION OF DEFENDANTS, B. P. DUNLAP, ET AL.

(Title Omitted.)

To the Honorable Court Aforesaid:

Come now the defendants, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, and for answer to plaintiff's Amended Bill of Complaint show as follows unto the Court:

I.

The defendants, B. P. Dunlap, F. E. Rogers and W. H. Rogers say that the Amended Bill, as to them, should be dismissed for want of equity, for that:

(a) It appears from the face of the Amended Bill that the plaintiff relies upon what is called a confirmation

oil and gas lease, dated May 8, 1931, recorded in Vol. 84, page 516, of the deed records of Gregg County, Texas, wherein the land covered and included in the original lease was described by specific field notes, and to which confirmation lease these named defendants were not parties; neither were they parties to the original lease; and the plaintiff, claiming only an oil, gas and mineral leasehold estate in and under said confirmation lease (or under the land covered by the original lease), could not obtain possession thereof except by reducing same to actual and physical possession by development and production of oil and gas from the land; and these defendants show that there has never been any development on the land now involved or covered by the lease now sought to be canceled as a cloud, for which reason plaintiff is not (and has not been) in possession of said strip of land or the mineral leasehold estate; and without possession it is not entitled to maintain a suit in equity, but has an adequate remedy at law in form of trespass to try title.

(b) All royalty owners under the J. F. Rogers tract are necessary and indispensable parties, as well as all royalty owners under the strip of land in controversy, as well all owners of miners or fee simple estate in the land lying between the Haynes tract, to the west, and the J. F. Rogers tract, to the east, including Sun Oil Company, The Texas Company, B. F. Phillips, A. O. Phillips, L. F. Burke, for that it has been established that the Haynes land, to the west, does not adjoin the J. F. Rogers tract, but that a strip of land lies immediately east of the Haynes land, which is not a part of the J. F. Rogers tract.

(c) A suit in equity is not maintainable until the plaintiff shall have established its legal title by an action at law, and since the bill shows that plaintiff is seeking, in this equity action, to recover both title and possession of the property, the bill should be dismissed.

31 II.

The defendants, Mrs. L. J. Rogers, J. E. Rogers and wife, Ola Mae Rogers, and Elvie Waskom and husband, Azzie Waskom, adopt the foregoing allegations as shown in paragraph I hereof, and in addition show that the plaintiff has never been in possession of the strip of land covered by the Dunlap lease.

III.

For answer, if same be necessary, the defendants show that they do not have sufficient knowledge of the facts with respect to the residences of all defendants to either admit or deny the allegations of fact contained in paragraph I of the Amended Bill.

IV.

These defendants admit that such a deed was executed along with other deeds of partition, as stated in the first part of paragraph II of the Amended Bill, but deny that "at the time same was executed the Wiley Davis northeast corner was a well-established corner, located and established on the ground, and a road had been established along such common line running southward to and across the public road and along the line between the Bozeman (now Haynes) east line and the Rogers west line south of the road." They say that if it be determined that at such time, in 1899, the Wiley Davis northeast corner was well located on the ground, yet when the various partition deeds were in process of being prepared and executed the parties to the partition; prior to the writing of the deeds, had a surveyor to run the north line of the tract mentioned in the deed of Feb. 28, 1899, recorded in Vol. R, at page 59, and said line was on the ground at the time actually run from the N. E.
32 corner of the Thomason Survey, west 880 yds., being 440 yards west of the N. W. corner of

W. H. Rogers tract No. 1 of such partition, and that the surveyor on the ground stopped at such point and made corner on the ground; that it was known then that such point was not a common point with any adjoining land, especially any land owned by Wiley Davis, but, to the contrary, the surveyor stopped and fixed the corner at 880 yards, as aforesaid, at the direction of the owners of the land then under partition, and the call from such point was South 880 yards, thence East 224, etc., as shown in the deed. And if the deed in fact now calls for the Wiley Davis corner, the same is called for by mistake, and the surveyor actually on the ground did not run the line to such corner, if the said corner was other than at 880 yards west of the northwest corner of the Thomason Survey. These defendants deny that such deed was intended to or did convey to J. F. Rogers the tract of land joining the Wiley Davis tract at its northeast corner and running south with such Davis tract and the west line of the tract now owned by J. M. Haynes to the southwest corner of said J. F. Rogers tract. In this connection, defendants show that in connection with such partition, J. F. Rogers never went into possession of any land west of a line south of the corner 880 yards west of the northeast corner of the Thomason Survey, and there was never any segregation of possession as to any land of the original common tract, west of such line south from such point 880 yards west of the northeast corner of the said Thomason Survey; and the
33 title and possession of such land remained in all the said original owners of the common tract, to-wit: J. W. Rogers, W. H. Rogers and F. E. Rogers and J. F. Rogers. The said deed of February 28, 1899, is not a deed of conveyance but is simply a partition deed and conveys no title whatsoever.

V.

These defendants admit the execution of the deed mentioned in paragraph III of the Amended Bill. They say

that the northwest corner of the said two-acre tract at 953 vrs. west of the northeast corner of said Thomason Survey is 3 varas west of the point 880 yards west of said northeast corner. Also that the defendants other than those executing said deed could under no circumstances be bound or prejudiced by the execution of said deed. The defendants each and all deny the allegations of the Amended Bill contained in paragraph III, page 4, beginning with the sentence, "On the date of October 20, 1930", etc.

VI.

The defendants deny the allegations of paragraph IV of the Amended Bill, especially the allegations that plaintiff immediately went into possession. Also the defendants deny that in confirmation of the original lease the lessors executed a ratification covering other or additional land, or intended to cover or include other or additional land; but, to the contrary, show that at the time the ratification lease was presented to lessors and executed by them, plaintiff, through its agent who presented said ratification lease, represented to lessors that it was but a ratification of the original lease, direct to plain-
34 tiff, and that the only change was to change the calls from yards to feet, and that no additional land was included therein. The lessors, relying upon such statement and having no means of knowing that other and additional land was included, signed the same. Lessors were not surveyors, or versed in land field notes, and did not know that the calls were materially changed, though plaintiff did know that fact and had surveyed the land and had found the original lease did not cover the land now in controversy (or land on the east side and south side of the 66-acre tract), and knowing such fact fraudulently represented to lessors that the change was simply from yards to feet. Furthermore, plaintiff did not pay anything whatsoever to lessors, and said confirmation was and is wholly without consideration.

Plaintiff has not developed for oil and gas the additional land so fraudulently included, and has in nowise changed its position on account thereof. Defendants deny any intention to include in said ratification lease any additional land than originally leased.

VII.

Defendants admit the allegations of paragraph V of the Amended Bill, save they say said lease is a good and valid lease. If mistaken that said lease is good and valid as to all said named lessors, it is good and valid as to an undivided interest of F. E. Rogers and W. H. Rogers. Also they show that at the time (or immediately thereafter) the partition of 1899 was made, the old steel shaft, about 2" in diameter with an old bevel gear wheel on upper end was set and driven in the ground by one of the said original Rogers and in the presence and with the knowledge of the others, as a land marker of the west northwest corner of the said original 176-acre tract, and was then and thereafter recognized as such by each and all said parties. Said marker was on the ground when
35 plaintiff took its lease, and the fence line was at and near said marker, and same has been recognized and acquiesced in as such marker for more than thirty-five years.

VIII.

Defendants deny that plaintiffs' lease covers and includes the land described in the Dunlap lease, as alleged by plaintiff in paragraph VI of the Amended Bill. They deny that they have clouded plaintiff's lease in any respect, and deny that plaintiff has title to the land covered by the Dunlap lease, or that plaintiff is or has ever been in possession of said land.

IX.

Defendants show that in 1899, when the partition was being effected, the north line of the 66-acre tract was run on the ground by the surveyor, and that same was run on the ground by the surveyor starting at the northeast corner of Lot No. 2, the northwest corner of Lot No. 1, W. H. Rogers tract, then ran west 440 yards and fixed corner; that the surveyor did not go on the ground further west than 440 yards, but stopped on the ground at 440 yards and staked corner; that the west line south was not run or the ground or any other of the lines, but same were calculated. That the deed was not then immediately prepared, but when prepared if the call for Wiley Davis corner is in the deed same was put in by inadvertence and mistake, and the line as actually surveyed on the ground did not go to the Wiley Davis corner, if said corner was or is any other place than 440 yards west of said northwest corner of Block No. 1. Said Wiley Davis corner was not fixed or located or
36 susceptible of definite ascertainment at the time, in 1899, and has not been capable of definite ascertainment since said time, and, being incapable of definite ascertainment, the call for west 440 yards controls.

X.

Defendants further show that in 1899, when the said north line was actually surveyed on the ground, the line was stopped at 440 yards west of the northwest corner of Lot No. 1, purposely and so that the original Rogers owners could at all times have an outlet from the north to the main public road leading from Gladewater and the west, to Longview, the County site, and to the east on to Shreveport, Louisiana; said public road being some half mile south of the north end of the Rogers 176-acre tract. The Rogers family were hauling logs and timber

from the north of said 176-acre tract and other land to the north, and purposely left a strip on the west side unpartitioned, so that at all times they would have an open outlet, as aforesaid; and there was no intention to include said strip in said 66-acre tract or to partition same in any respect. And there was no intention to include it in the ratification lease now claimed by plaintiff.

XI.

Defendants further aver that at the time the partition was made of the Rogers land referred to in plaintiff's bill and also in this answer, the Rogers family, desiring to leave a strip on the west side for an open roadway, had said land surveyed, as above alleged, to begin at the northeast corner of the Survey, thence to run west 880 yards, for Lots Nos. 1 and 2; thence South 880 yards to a corner marked by an old gear wheel, which gear wheel is now standing in the ground and marks the
37 corner of said land partitioned; thence ran east 224 varas to corner. At this corner, there was a fence running in a northeasterly direction. The call then being, thence North 310 yards, at 12 deg. east of north; thence East 754 yards to W. H. Rogers' line, which these defendants aver was a well-established line and marked on the ground at that time; thence North 572 yards to the starting point, which was a well-marked starting point, 440 yards west of the northeast corner of the G. A. Thomason Headright Survey—the northwest corner, as established on the ground, and the southwest corner, as established on the ground, being established at a point 68 feet east of the line claimed by the plaintiff in plaintiff's amended bill of complaint, this being left out by the surveyor at the request of the Rogers family for a road, to be jointly owned and controlled by the parties to the said partition. And in this connection, defendants aver that if you take the northwest corner, as claimed by the plaintiff in plaintiff's amended bill of complaint and run

a line south, then run east 224 yards, as called for in the deeds, you will lack 68 feet of going to the old fence line, and you either leave 68 feet out of the partitioned land, on the southwest side, or 68 feet on the east side, as claimed by these defendants. For, if you run from the southwest point, as claimed by the plaintiff, east 224 yards, there will be 68 feet between the fence and the call distance; thence north 310 yards, at 12 deg. east of north, and there will be 68 feet between the line and the old fence; thence north 754 yards to W. H. Rogers' line, and there will be 68 feet, or approximately that amount, between the actual southern boundary, as established by the survey, and the actual southern boundary as claimed by these defendants. So the defendants either own the land which they claim, from a point 880 varas
38 west of the northeast corner of the G. A. Thomason Survey to the west line of the Rogers land, as originally established on the ground, or they own the land on the southeast portion, from a point 224 yards east of any southwest corner which may be established by the Court, and they are entitled to have set aside to them this land not included in the partition, either on the west or on the southeast.

XII.

Answering further, the defendants further aver that if plaintiff's contention is true in this case, then the Rogers family was conveying land which it never owned, and the plaintiff, in its amended bill of complaint, is claiming land which was never included in the Rogers title. And in this connection, these defendants aver that the Rogers tract of land constituted the northeast one-quarter of the Survey and could not have covered the land claimed by plaintiff. The defendant B. P. Dunlap owns both the Rogers' title and the Moseley title to the particular land claimed herein by the plaintiff. In other words, he has the title under the heirs of the Rogers

family, and also has the title under Augustus Moseley, and in any event the plaintiff could not have title to the tract of land claimed by plaintiff.

Wherefore, having fully answered, defendants pray that the amended bill of complaint be dismissed, and, in the alternative, they pray that if lessors in the original lease and ratification, as claimed by the plaintiff, be bound thereby, and that said strip be held to be included therein, then that the other defendants, B. P. Dunlap and the other members of the Rogers family not
39 signing said ratification be adjudged to own an undivided interest therein, and that their undivided interest therein be recognized and established and that the same be partitioned and set off to them, as the same is susceptible of partition in kind.

W. A. WADE,
ANGUS G. WYNNE,
Attorneys for Defendants.

XIII.

And now come said defendants and, becoming actors herein, without waiving their motion to dismiss and only subject to the said motion to dismiss, aver that the so-called ratification referred to by the plaintiff as having been dated on October 20, 1930, and signed by L. J. Rogers, J. E. Rogers, A. S. Waskom and his wife, Elvie Waskom, and the other lease which plaintiff claims as dated May 8, 1931, recorded in Vol. 84, page 516, should not in equity cover any part of the land claimed by the defendant B. P. Dunlap herein, for L. J. Rogers, J. E. Rogers and A. S. Waskom and his wife, Elvie Waskom, did not own any interest in the tract of land claimed by B. P. Dunlap save and except an undivided interest therein. They leased in good faith to W. P. Chandler the land described in the lease dated October 20, 1930, which did not include the land now claimed by plaintiff and owned by B. P. Dunlap; but in 1931, the said land having become very valuable for mineral purposes, the

plaintiff, Empire Gas & Fuel Company, sent its
40 agent to see J. E. Rogers, L. J. Rogers and the Waskom owners, and represented to them that the old lease which had been signed to Chandler was written out in varas and that they desired to have the lease set out in fact; that the ratification which they desired to have signed did not include any more land than the first lease which they had given them, and that they were not paying them any consideration for the ratification because the same was not taking in more of their land than actually was included in the metes-and-bounds description of the first lease, dated in October, 1930, and given to the said Chandler, and as referred to by plaintiff. The said J. F. Rogers, J. E. Rogers and the Waskoms, being unacquainted with field notes, relied upon the statement made by the said Cox and Patterson, the representatives of the Empire Gas & Fuel Company, and signed said instrument to ratify the former lease, and to change the field notes from varas to feet, but without any intent of leasing any more of their land and without knowledge that they had leased any more of their land. Therefore, the said plaintiff cannot take advantage of its own wrong and fraud, and the said ratification lease should be in all things canceled by a judgment of this Court, and the said J. E. Rogers, J. F. Rogers and B. P. Dunlap here and now file their cross-action, joined in by the Waskoms and, subject to their motion ot dismiss, pray the Court that in the judgment which should be entered herein said ratification be in all things canceled.

And, continuing as actors herein, said defendant B. P. Dunlap and the other defendants herein aver and allege to the Court that the tract of land claimed by plaintiff and described by plaintiff, and as described in the lease of B. P. Dunlap, is by metes and bounds as follows:

41 Beginning at an old steel shaft about 2" in diameter with an old bevel gear wheel on upper

end, as a land mark stake set for the W. N.-W. corner of a 176 acre tract of land and the S.-W. of the J. F. Rogers tract of land by the surveyor on the ground in the year 1899;

Thence Northerly along the W. B. line of said J. F. Rogers tract of land to the N.-W. corner thereof on the N. B. line of the said headright survey a distance of about 880 yards;

Thence West 66.89 feet to the N.E. corner of the Clark land which is also the N.-W. corner of the Alexander Rogers original tract of land prior to the junior surveys thereof made in the year 1899;

Thence Southerly 880 yards along the East boundary lines of the Clark land and the Haynes land, which is also the West boundary line of the said Alexander Rogers land, to a 1¼" iron pipe stake set in the West boundary line of the said Alexander Rogers tract of land, the same being the S.-W. corner of this tract;

Thence East 66.89 feet to the place of beginning and containing five (5) acres of land, more or less.

Save and except about 2 acres of land conveyed to J. W. Mings by Mrs. L. J. Rogers, et al, by deed dated May 7, 1917, and recorded in Volume 32, page 564, Deed Records of Gregg County, Texas.

This land is fully covered by the lease of B. P. Dunlap from F. E. Rogers, W. H. Rogers and others, as shown by lease of record in Volume 170, page 602, of the Deed Records of Gregg County, Texas. Further, the said B. P. Dunlap, by virtue of a line agreement with B. F. Phillips, L. F. Burke and others, owning the land west of the above-described land, owns all of the title held by the Rogers family to this strip and all of the title held by

the Moseley family to this land, and in any event he is the owner of an undivided interest in said land with the said Empire Gas & Fuel Company, should the Court hold that the ratification lease signed by J. E. Rogers, J. F. Rogers and the Waskoms is a valid and subsisting lease and ratification. And, in the alternative, this defendant, B. P. Dunlap, would be entitled to a partition
42 thereof with the plaintiff, Empire Gas & Fuel Company. However, should this Honorable Court determine that the line of the Empire Gas & Fuel Company on the west would include defendant's lease, then the defendants, B. P. Dunlap and F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers and wife, Ola Rogers, Elvie Waskom and A. S. Waskom, allege and aver that that portion of the land claimed by the Empire Gas & Fuel Company beginning at a point 224 varas east of any southwest corner which may be determined by the Court; thence north 310 yards at 12 deg. east of north; thence east 154 yards to the W. H. Rogers line; thence south with W. H. Rogers' line to the north line of the King tract; thence west 154 yards to corner; thence south 12 deg. west of south 310 yards to corner; thence west 68 yards to beginning is in no way covered by the lease of the Empire Gas & Fuel Company, at all. In other words, the Empire Gas & Fuel Company cannot extend its line on the west and at the same time hold this land on the east because its lease either does not cover the land on the west or it does not cover the land on the east, and these defendants aver and allege, by way of cross-action, that if the Court determine that the southwest corner of the Empire Gas & Fuel Company lease is at the southwest corner of the B. P. Dunlap lease, as described by plaintiff and as above described, then defendants aver that all of the land lying east of a point 224 varas west of said corner is in no way covered by the lease of the Empire Gas & Fuel Company, and these defendants would be entitled to have the judgment of the Court establishing said southeast corner of the Empire Gas &

Fuel Company lease and establishing the other corners of said lease on the south line thereof.

The defendant B. P. Dunlap is the owner of
43 on oil, gas and mineral lease from J. E. Rogers, A. S. Waskom and all of the other heirs and owners of the Rogers land covering the land on the southeast of the Empire lease, as above described, and in all equity, if the Empire Gas & Fuel Company is permitted to take their lease away from them on the west, he is entitled to be protected and to have his lease established on the southeast, and to have any claim or claims of the said Empire Gas & Fuel Company canceled as to his said oil, gas and mineral lease.

Defendants B. P. Dunlap, F. E. Rogers, L. J. Rogers, J. E. Rogers, Elvie Rogers Waskom and A. S. Waskom further aver to the Court that the real beginning corner of the lease of the plaintiff, as given to it by L. J. Rogers, J. E. Rogers and A. S. Waskom and wife, Elvie Waskom, was 440 yards east of the northeast corner of said Thomason Survey, but in the so-called ratification the said beginning corner is about 60 feet east of the actual beginning corner. In other words, instead of beginning at 440 yards from the northeast corner of the Thomason Survey, and which was the northwest corner of Tract No. 1 of the subdivision as made by the Rogers family, the Empire Gas & Fuel Company, by its present field notes and claims, seeks to claim the land on the west and abandon the land on the east; so these defendants allege and charge that they are entitled to have the boundary lines of the said lease established, once and for all, where they should be. They aver that the beginning corner of said lease should be at a point 440 yards east of the northeast corner of the Thomason Survey; thence to run west 440 yards for corner; thence south to corner at the old gear wheel; thence east 224 yards to corner; thence
44 north 310 yards at 12 deg. east of north; thence east 154 yards to W. H. Rogers line; thence

north 572 yards to the starting point, which gives to the complainant all of the land which was ever covered by its lease; but should the Court find and determine that the ratification lease should control, then these defendants aver that they are entitled to have the northeast corner of the lease of the Empire established 1228 feet east of the northeast corner of the 2-acre tract and to have the southeast corner established 224 yards east of the southwest corner, as may be found by the Court, and they pray, as cross-complainants that they have judgment so establishing the corners of the Empire Gas & Fuel Company lease, either by the ratification or by the original lease, whichever one is fair, just and right, and that there be partitioned off to B. P. Dunlap and those other defendants who did not sign either of the leases to the Empire Gas & Fuel Company such portions of such lease as may to the Court seem just and right.

Wherefore, the defendants B. P. Dunlap and others, without waiving the motion to dismiss and their answer to the claims of the Empire Gas & Fuel Company in its amended bill, and in the alternative, becoming actors and cross-complainants, pray the Court that all claims of the said Empire Gas & Fuel Company to the tracts of land described in the lease from W. H. Rogers and others to B. P. Dunlap, of record in Volume 170, page 602, of the deed records of Gregg County, and above re-
45 ferred to, be canceled; that the so-called ratification lease signed by J. E. Rogers and others, and above referred to, dated in May, 1931, be canceled. But if the Court should hold that the said so-called ratification lease is binding on the said A. S. Waskom, J. F. Rogers and the other signers thereto, then that the said lease be partitioned and that the interest of the said B. P. Dunlap and those under whom he claims who did not sign the said so-called ratification lease be set aside and partitioned to them; and in the further alternative, should the Court hold that the said B. P. Dunlap and the other

defendants are not entitled to any relief with regard to the land on the west, then that the Court determine the boundaries of the Empire Gas & Fuel Company lease at the northeast corner, the south and east and that they be established at a point 224 feet east of any southwest corner established by the Court, and that the northeast corner be established either at a point 440 yards east of the northeast corner of the Thomason Survey or at a point 68 feet west of a point 440 yards east of the northeast corner of said survey, and that from said beginning corner said B. P. Dunlap have set aside to him his oil, gas and mineral lease covering the land described therein and as above described; that defendants have partition of said lease, together with such other and further relief to which these defendants, as cross-complainants, may be entitled, in an equitable trial as to their rights.

(Signed) W. A. WADE,
(Signed) ANGUS G. WYNNE,
Attorneys for Defendants and Cross-Plaintiffs.

Answer and Cross-Action of Defendants B. P. Dunlap, et al. Filed January 27, 1936.

REPLICATION TO THE ANSWER AND CROSS ACTION OF DEFENDANTS.

46 (Title Omitted.)

To the Honorable Court:

Your Complainant files this Replication to the Answer and Cross-Action of Defendants B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie Rogers Waskom and husband, Azzie Waskom, and says:

I.

Your Complainant denies that part of paragraph IV wherein it is alleged that when the partition deed was in

process of being executed the parties thereto had a surveyor run the North line of the tract mentioned in the deed of February 28, 1899, and he stopped on the ground said North line and established a corner at a distance of 880 yards West of the Northeast corner of the Thomason Survey. Complainant further denies the allegations of said paragraph that the call in the deed for the Wiley Davis Northeast corner was made by mistake and denies the allegation that the surveyor did not actually run the line to said corner. It further denies the allegations that J. F. Rogers never went into possession of any land West of a line South of a corner 880 yards West of the Northeast corner of the Thomason Survey, and in this connection alleges that the said J. F. Rogers did actually go into possession of the land West of the corner 880 yards West of the Northeast corner of the Thomason Survey and went into possession of all the land between the Northeast corner of the Thomason Survey and the Wiley Davis tract.

47 II.

Complainant denies that part of paragraph VI wherein defendants allege that at the time the ratification lease was presented to the lessors, Complainant represented that the only change was in the calls from yards to feet. Complainant specially denies that it fraudulently represented to the lessors that the only change was from yards to feet.

III.

Complainant denies the allegations in paragraph VII that the old bevel gear was driven in the ground by one of the Rogers as a land marker for the Northwest corner of the 176 acre tract and denies the allegations that said bevel gear has been recognized as a corner.

IV.

Answering paragraph IX, Complainant denies that, when the partition was made, the Surveyor stopped the line on the ground at 440 yards West of the Northeast corner of Lot No. 2 and fixed said corner with a stake. It denies that the call for the Wiley Davis corner was placed in the deed through inadvertence and mistake and it denies that the line actually surveyed on the ground did not go to the Wiley Davis corner. Complainant further denies that the Wiley Davis corner was not fixed or located or susceptible of definite ascertainment at the time of the partition in 1899 and it denies that said corner has not been capable of definite ascertainment since said time. Complainant avers that it and its predecessors in title purchased in good faith, paying a valuable consideration therefor, the oil and gas lease which it now owns and holds, relying upon the call in the deed and oil and gas lease for the Wiley Davis Northeast corner as marking and fixing the Northwest corner of the tract of land conveyed by J. W. Rogers and others to F. E. Rogers, and without any knowledge or notice of the claims now asserted by defendants to the strip of land described in the purported oil and gas lease from F. E. Rogers,
48 et al, to B. P. Dunlap and without any notice or knowledge that the call for the Wiley Davis Northeast corner was inserted by mistake in the deeds and oil and gas lease (if such call was inserted through mistake, which Complainant does not admit but denies).

V.

Answering paragraph X, Complainant denies that, when tract No. 2 was surveyed, the Northwest corner was stopped at a point 440 yards West of the Northwest corner of tract No. 2 but, in this connection, says that if the said line was stopped and a strip of land was left for a road, title to said strip passed to J. F. Rogers subject to the easement.

VI.

Answering paragraph XI, Complainant denies that the Northwest corner of tract No. 2 was fixed on the ground at a point 880 yards West of the Northeast corner of the Thomason Survey and specially denies that a stake or old gear wheel was driven in the ground by the Surveyor to mark the Southwest corner of Tract No. 2. In this connection, Complainant says that, if a strip was left out of the field notes for the purpose of a road, the fee simple title to said strip passed to J. F. Rogers, subject to the easement. Complainant denies that defendants own either a strip of land on the West side of Complainant's lease, not covered by the description in Complainant's said lease, or a strip of land on the East side of its lease.

VII.

Answering paragraph XII, Complainant denies that the Rogers family never owned the East one-half of the Thomason Survey.

VIII.

Complainant, answering the cross-action and the allegations contained in paragraph XIII of defendants' answer and cross-action, moves to strike said cross-action and dismiss same for the following reasons:

(a) The allegations contained in the cross action are insufficient in equity to state any cause of action against Complainant;

(b) The allegations are vague, uncertain and indefinite and do not apprise Complainant of what the said defendants expect to prove thereby;

49 (c) The allegations contained in said cross-action are repugnant, conflicting, and mutually

destroy each other, and are in the alternative contrary to the Rules of Equity.

(d) Said allegations are argumentative and conclusions of law and no specific fact is stated showing that, in equity, said defendants are entitled to the relief for which they pray;

(e) The said allegations are insufficient in equity to allege or prove that the defendants ever owned title to the said land involved in said cross-action.

IX.

Complainant, answering the cross-action of said defendants, denies all the allegations of paragraph XIII, except such allegations as are hereinafter specially admitted. Complainant admits that Mrs. L. J. Rogers, J. E. Rogers, A. S. Waskom and wife, Elvie Waskom, executed the oil and gas lease to W. P. Chandler, but they deny the allegations that said lease did not include the strip of land heretofore described in its amended bill of complaint. It denies the allegations that it and its agents perpetrated fraud upon the said J. F. Rogers, J. E. Rogers and A. S. Waskom and wife, Elvie Waskom, in securing the correction and ratification deeds. In this connection it says that the original lease executed to W. P. Chandler did cover and include all the land included in the correction and ratification lease. Complainant denies that the said B. P. Dunlap owns any title to the tract of land fully described by metes and bounds in paragraph XIII of said answer and cross-action and it denies that the defendants own a strip of land along the East side of the land Complainant has under lease, which was not covered and included in the oil and gas leases to Complainant. Complainant denies the allegation that the real beginning corner of the lease to W. P. Chandler, which title Complainant now holds, was 440 yards West of the North-

east corner of the said Thomason Survey, and in this connection alleges that the beginning corner, being the Northeast corner of Tract No. 2, as actually located on the ground, was 451 yards West of the Northeast corner of the Thomason Survey, and it denies that the beginning corner in the ratfication lease is 60 feet East of the beginning corner in the original lease. Complainant denies that the boundaries of its lease should be established according to the course and distance calls contained in said answer and cross-action and, in this connection, says that it has a lease upon all of the land that its lessors owned in the Thomason Survey and its lessors, at the time they executed the leases, owned all of the land herein sued for by Complainant, and owned at said time all the land herein sued for by defendants in their cross-action.

X.

Complainant denies each and every allegation contained in the defendants' cross-action, except such allegations as are specially admitted herein.

Wherefore, Complainant prays that its title to the land herein sued for be quieted and the cloud removed and that the defendants take nothing by their cross-action.

H. J. PATTERSON,
PHILLIPS, TRAMMELL, ESTES,
EDWARDS & ORN,
CLAYTON L. ORN,
Attorneys for Complainant.

Replication to the Answer and Cross-Action of Defendants. Filed as of April 27, 1936.

JOINT MOTION OF EMPIRE GAS & FUEL COMPANY, ET AL, TO SUBSTITUTE EMPIRE OIL & REFINING COMPANY AS COMPLAINANT.

51 (Title Omitted.)

Comes now Complainant, Empire Gas & Fuel Company, and Empire Oil & Refining Company and respectfully represents to the Honorable Court the following facts:

I.

Complainant, Empire Gas & Fuel Company, is a private corporation incorporated under the laws of the State of Maine. Empire Oil & Refining Company is a private corporation incorporated under the laws of the State of Delaware and is a citizen, resident and inhabitant of such State and has a permit to do business in the State of Texas.

II.

At the time Complainant, Empire Gas & Fuel Company, filed the Bill of Complaint herein, all of its stock except the Directors' qualifying shares was owned by the Empire Oil & Refining Company. On or about the 31st day of March, 1936, Complainant, Empire Gas & Fuel Company, made, executed and delivered to Empire Oil & Refining Company deeds, assignments and transfers, conveying, assigning and transferring to Empire Oil & Refining Company all the right, title and interest of the Empire Gas & Fuel Company in and to the oil and gas leasehold estate involved in this controversy, thereby conveying to Empire Oil & Refining Company all of the right, title and interest of the Empire Gas & Fuel Company in and to the oil and gas lease executed by Mrs. L. J. Rogers, et al, to W. P. Chandler, Lessee, on October

20, 1930, and recorded in Volume 61, page 295 Deed Records of Gregg County, Texas, and the correction oil and gas lease executed by Mrs. L. J. Rogers and
52 others to Empire Gas & Fuel Company, Lessee, on May 8, 1931, and recorded in Volume 84, page 516 Deed Records of Gregg County, Texas.

Wherefore, Complainant and Empire Oil & Refining Company pray that the Honorable Court substitute Empire Oil & Refining Company as Complainant in this action in lieu of Empire Gas & Fuel Company.

H. J. PATTERSON,
PHILLIPS, TRAMMELL, ESTES, EDWARDS & ORN,
Attorneys for Empire Gas & Fuel Company and Empire Oil & Refining Co.

Joint Motion of Empire Gas & Fuel Company, et al, to Substitute Empire Oil & Refining Company as Complainant. Filed as of April 27, 1936.

ORDER SUBSTITUTING EMPIRE OIL & REFINING COMPANY AS COMPLAINANT.

53 (Title Omitted.)

Order.

On the 27th day of April, 1936, came Complainant, Empire Gas & Fuel Company and Substitute Complainant, Empire Oil & Refining Company, and filed their joint motion herein to substitute Empire Oil & Refining Company as Complainant in this action in lieu of and in place of Empire Gas & Fuel Company; and it appearing to the Court from the evidence and agreement of the parties

hereto that Empire Oil & Refining Company, at the time this action was instituted, owned all the stock of the Empire Gas & Fuel Company, Complainant herein, except the qualifying shares; that on or about March 31, 1936, Empire Oil & Refining Company, the parent corporation, acquired the assets of the Empire Gas & Fuel Company situated in the State of Texas; that on said day and date Empire Gas & Fuel Company made, executed and delivered to Empire Oil & Refining Company certain deeds, assignments and transfers, assigning, transferring and conveying to Empire Oil & Refining Company all the right, title and interest of Empire Gas & Fuel Company in and to the real property described in the oil and gas lease executed by Mrs. L. J. Rogers, a widow, and others, to W. P. Chandler, Lessee, on October 20, 1930, and recorded in Volume 61, page 295 Deed Records of Gregg County, Texas, and the correction oil and gas lease executed by Mrs. L. J. Rogers and others to Empire Gas & Fuel Company, Lessee, on May 8, 1931, and recorded in Volume 84, page 516 Deed Records Gregg County, Texas; that under the provisions of said transfer and assignment Empire Oil & Refining Company succeeded to and acquired the title, if valid, of the Empire Gas & Fuel Company to the oil and gas leasehold estate on the strip of land involved in this controversy; that the Empire Oil & Refining Company is incorporated under the laws of the State of Delaware and has a permit to do business in Texas, and is a citizen, resident and inhabitant of said State of Delaware, and there exists a
54 diversity of citizenship between said substituted complainant, Empire Oil & Refining Company, and defendants.

It is therefore Ordered that Empire Oil & Refining Company be, and it is hereby, substituted as complainant in this action and said action shall proceed in the name of Empire Oil & Refining Company.

It further appearing to the Court that the Empire Gas & Fuel Company, prior to the trial of said cause, transferred to Empire Oil & Refining Company whatever right, claim, title and interest it had in and to the land and premises involved in said action;

It is therefore Ordered that the said Empire Gas & Fuel Company be and it is hereby dismissed as complainant in this cause of action, and this action shall be continued in the name of Empire Oil & Refining Company, as fully as if this action had originally been brought by Empire Oil & Refining Company.

Entered at Sherman, Texas, this the 30 day of April, A. D. 1938.

RANDOLPH BRYANT,
Judge.

Filed May 2, 1938.

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55 DECREE.

In the District Court of the United States, for the Eastern District of Texas, Tyler Division.

Empire Gas & Fuel Company
vs. No. 803 Equity.
B. P. Dunlap, et al.

This cause came on to be heard on the 27th day of April, A. D. 1936, at a regular term of this Court and came Complainant, Empire Oil & Refining Company, and announced ready for trial, and came the defendants, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, and Elvie (Rogers) Waskom and husband, Azzie Waskom, and pre-

sented their motion to dismiss the bill of complaint filed herein by Complainant, on January 11, 1936, and the Court having considered said motion, was of the opinion that it was not well taken and should be denied;

It is therefore Ordered that said defendants' motion to dismiss the bill of complaint be and the same is hereby denied, to which action and ruling of the Court defendants duly excepted; thereupon came Complainant, Empire Oil & Refining Company, and presented its motion to dismiss the cross-action filed by defendants, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, and Elvie (Rogers) Waskom and husband, Azzie Waskom, and the Court having considered said motion was of the opinion that it was not well taken and should be denied;

It is therefore Ordered that Complainant's motion to dismiss the cross-action of said defendants be and the same is hereby denied;

And thereupon the Complainant and defendants announced ready for trial, and said cause was tried from day to day. At the conclusion of the evidence, the
56 Court announced that the case would be taken under advisement and no decree would be rendered and entered until Complainant and defendants had an opportunity of presenting to the Court their request for findings of fact and conclusions of law; thereupon the Court took said cause under advisement from term to term, pending the submission by counsel for Complainant and Respondents of their requested findings of fact and conclusions of law, and authorities thereon;

The Court, after considering the requested findings of fact and conclusions of law submitted by counsel for Complainant and Respondents and having heard argument of counsel, is of the opinion that the following

decree should be entered and said decree is, on the 30th day of April, A. D. 1938, entered as a decree of this Court:

(1) It Is Ordered, Adjudged and Decreed by the Court that Empire Oil & Refining Company is hereby substituted as Complainant in this action, in place of and in lieu of Empire Gas & Fuel Company, the Empire Oil & Refining Company and Empire Gas & Fuel Company having made motion for substitution of said Empire Oil & Refining Company as Complainant during the trial of this cause:

(2) It Is Ordered, Adjudged and Decreed by the Court that Complainant, Empire Oil & Refining Company, a corporation, does not own, hold or have any right, title or interest in or to the oil, gas and mineral leasehold estate and the minerals on, in and under the following described tract of land, to-wit:

Being all that certain lot, tract and parcel of land in Gregg County, State of Texas, in the Geo. A. Thomason Headright Survey, lying West of the West boundary line of the J. F. Rogers tract of land as surveyed in the year 1899, and East of the West boundary line of the Alexander Rogers tract of land established in or about the year 1855, which line is also the East boundary line of the G. W. Clark and M. P. Haynes tract of land, this lot, tract and parcel of land being more particularly described as follows, to-wit:

Beginning at an old steel shaft about 2" in diameter with an old bevel gear wheel on upper end, as a land mark stake set for the W. N.-W. corner of a 176 acre tract of land and the S.-W. corner of the J. F. Rogers tract of land by the surveyor on the ground in the year 1899;

Thence Northerly along the W. B. line of said J. F. Rogers tract of land to the N.-W. corner thereof on the

N. B. line of the said headright survey a distance of about 880 yards;

57 Thence West 66.89 feet to the N.E. corner of the Clark land which is also the N.-W. corner of the Alexander Rogers original tract of land prior to the junior surveys thereof made in the year of 1899;

Thence Southerly 880 yards along the East boundary lines of the Clark land and the Haynes land, which is also the West boundary line of the said Alexander Rogers land, to a 1¼" iron pipe stake set in the West boundary line of the said Alexander Rogers tract of land, the same being the S.-W. corner of this tract;

Thence east 66.89 feet to the place of beginning and containing five (5) acres of land, more or less.

Save and except about 2 acres of land conveyed to J. W. Mings by Mrs. L. J. Rogers, et al, by deed dated May 7, 1917, and recorded in Vol. 32, page 564, Deed Records of Gregg County, Texas.

It is therefore Ordered, Adjudged and Decreed by the Court that Complainant, Empire Oil & Refining Company, a corporation, have of and take nothing from the defendants, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, Curtis M. Willock and J. B. Parker insofar as Complainant seeks to quiet its title to the oil and gas leasehold estate and minerals on, in and under the tract of land above described.

(3) It is further Ordered, Adjudged and Decreed by the Court that defendant, B. P. Dunlap, owns, has and holds the title to the oil and gas leasehold estate and 7/8ths of the minerals on, in and under the tract of land

above described in paragraph (2) hereof, subject to the terms and provisions of that certain oil and gas lease executed by F. E. Rogers and others to B. P. Dunlap, dated October 10, 1934, and recorded in Volume 170, page 602, et seq., Deed Records of Gregg County, Texas.

(4) It is further Ordered, Adjudged and Decreed by the Court that Complainant, Empire Oil & Refining Company, owns, has and holds an oil and gas lease and mineral leasehold estate and 7/8ths of the minerals on, in and under the following described tract of land situated in Gregg County, Texas, to-wit:

Being a part of the G. A. Thomas H. R. starting at the NE cor. of Lot No. 2, which is the NW cor. of W. H. Rogers Tract Lot No. 1 running West 440 yards; thence S. 880 yards; thence East 224 yards; thence North 310 yards at 12° East of North; thence East 754 yards to W. H. Rogers line; thence North 572 yards to starting point, containing 68-1/5 acres, more or less, and being the same land described in a deed from J. W. Rogers,
W. H. Rogers and F. E. Rogers to J. F. Rogers,
58 Feby. 28, 1899, rec. Vol. "R", pp. 59-60, Deed
Records of Gregg County, Texas, save and except
2 acres out of the N. W. cor. sold to R. M. Wood.

subject to the terms and provisions of that certain oil and gas lease dated October 20, 1930, executed by Mrs. L. J. Rogers, et al, to W. P. Chandler, and recorded in Vol. 61, page 295, Deed Records of Gregg County, Texas; and it is therefore Ordered, Adjudged and Decreed by the Court that Complainant, Empire Oil & Refining Company, be quieted in its title and possession of the oil and gas leasehold estate and 7/8ths of the minerals on, in and under said tract of land described in this paragraph, subject to the terms and provisions of said oil and gas lease.

(5) It is further Ordered, Adjudged and Decreed by the Court that the oil and gas lease owned by B. P. Dunlap

above described in paragraph (2) of this decree, does not constitute a cloud upon the title of Complainant to the oil and gas leasehold estate and minerals on, in and under the tract of land above described in paragraph (4), it being the decree of this Court that the tract of land covered by the oil and gas lease to said B. P. Dunlap, described in paragraph (2) hereof lies immediately West of and adjacent to the tract of land described in paragraph (4), upon which the Empire Oil & Refining Company owns an oil and gas lease.

It is further Ordered, Adjudged and Decreed by the Court that the defendant, B. P. Dunlap, on his cross-action herein filed, have of and recover from Empire Oil & Refining Company, judgment and decree quieting his title and possession of the oil and gas leasehold estate and 7/8ths of the minerals on, in and under the tract of land above described in paragraph (2) hereof, subject to the terms of said lease to B. P. Dunlap.

(7) It is further Ordered, Adjudged and Decreed that the defendants, Curtis M. Willock and J. B. Parker are likewise bound by the decree herein, since their right to any royalty interest is under the Complainant, Empire Oil & Refining Company's lease.

(8) It is further Ordered, Adjudged and Decreed that any actions or parties to this suit not finally herein disposed of are hereby dismissed.

59 (9) It is further Ordered, Adjudged and Decreed by the Court that Complainant's bill of complaint be and the same is hereby dismissed with prejudice for want of equity insofar as Complainant seeks to remove cloud and quiet title to the oil and gas leasehold estate on the strip of land described in paragraph (2) hereof.

(10) It is further Ordered, Adjudged and Decreed by the Court that defendants have of and recover from Complainant, Empire Oil & Refining Company, all costs in their behalf expended, for which let execution issue.

The Court will make and file herein findings of fact and conclusions of law, separately from this decree.

To which action and ruling of the Court in entering this decree, Complainant, Empire Oil & Refining Company, and defendants, Curtis M. Willock and J. B. Parker, each, in open Court, excepted and such exceptions are allowed.

Entered this the 30 day of April, A. D. 1938.
(Sgd) RANDOLPH BRYANT,
Judge Presiding.

Decree. Filed May 2, 1938.

FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER EQUITY RULE 70½.

60 Filed April 30, 1938.

(Title Omitted.)

Statement of the Case.

On January 11, 1936, Empire Gas & Fuel Company, a corporation, filed its amended and substituted bill of complaint in this cause, naming as Respondents, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and her husband, Azzie Waskom, Curtis M. Willock and J. B. Parker, to quiet its title to the oil and

gas leasehold interest and estate and 7/8ths of the minerals on, in and under a strip of land 66.89 feet by 1883 feet on the west side of the east one-half of the G. A. Thomason 640 acre headright survey situated in Gregg County, Texas.

Respondents, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers and wife, Ola Mae Rogers, and Elvie Waskom and husband, Azzie Waskom, answered by motions to dismiss and special denials, averring that Complainant did not own the oil and gas lease on the strip of land. Respondents also filed a cross-bill to quiet their title to said tract of land.

Findings of Fact.

The facts, for the purposes of the decree, are substantially as follows:

1. Empire Gas & Fuel Company, original Complainant, was duly incorporated under the laws of the State of Maine, and is a citizen of such State; Empire Oil & Refining Company is the successor of Empire
61 Gas & Fuel Company, and was substituted as Complainant herein, and was duly incorporated under the laws of the State of Delaware, and is a citizen of such State. Both are private corporations doing business in Texas under permits duly issued by the Secretary of State. All respondents, except Curtis M. Willock and J. B. Parker, are citizens of the State of Texas, and some of them reside in the Tyler Division of this Court. Willock is a citizen of the State of California. Parker is a citizen of the State of Louisiana. The action is to remove cloud from the alleged title of Complainant, and to quiet such title, to the oil, gas and mineral leasehold estate in a strip of land about 66 feet wide and 1883 feet long in the G. A. Thomason Survey in Gregg County, Texas. Such leasehold estate, as well as the claims of each of

Respondents thereto sought to be removed in this suit, are of a value in excess of Three Thousand ($3,000.00) Dollars, and each of such claims depreciate the value of Complainant's title, if valid, in excess of Three Thousand ($3,000.00) Dollars, and this Court has jurisdiction.

2. The G. A. Thomason Survey 175 was patented on June 2, 1854, by the State of Texas to Matthew Cartwright, Assignee of George A. Thomason, as containing 640 acres of land. The tract was described by metes and bounds in the patent to be in the form of a square 1900.8 varas, with the boundary lines extending due north, south, east and west. Bearing trees were called for at the four corners, but such trees were destroyed prior to the time Complainant filed its bill of complaint. There was testimony introduced showing, by reputation, the location of said trees, and from all of the evidence introduced, as well as the agreement of the parties made during the trial of the cause, the Court finds that, from a survey made on the ground of the Thomason Survey 175 the north line is now fixed at 1946.4 varas, the south line at 1934 varas, the east line at 1938 varas and the west line at 1940 varas.

3. By mesne conveyances, the fee simple title to the east one-half of said G. A. Thomason Survey 175 vested in Louisa Rogers on September 7, 1882. From the testimony introduced and the agreement of the parties made during the trial of the cause, the Court finds that, on September 7, 1882, Louisa Rogers owned, in fee
62 simple, title to the following part and parcel of the said G. A. Thomason Survey, as shown by her deed:

The east half of survey No. 175 of G. A. Thomason headright certificate known as follows:

Commencing at the SE. corner of Survey No. 175; thence N. 1900 vrs. to a stake from which a pine brs. S.

89 deg. E. 7 vrs. a red oak brs. N. 61 deg. E. 8-8/10 vrs; thence W. 950 varas; thence South 1900 vrs.; thence East to the beginning, containing three hundred and twenty acres of land, more or less.

The strip involved in this controversy is that certain tract of land lying along the west side of the tract of land above described, which above tract was owned by Louisa Rogers, on September 6, 1882, and was acquired by her through a deed from Alexander Rogers.

4. Sometime between September 6, 1882, and February 28, 1899, Louisa Rogers died intestate and left as her sole surviving heirs at law four sons, to-wit: W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers.

5. On and prior to February 28, 1899, W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers owned in fee simple the east one-half of the said G. A. Thomason Survey, as described in deed to Louisa Rogers, above copied.

6. On or about February 28, 1899, W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers employed J. H. Simmons, a surveyor, to make a survey on the ground of the land described above for the purpose of partitioning said tract into three parcels. Thereafter J. W. Rogers, J. F. Rogers and F. E. Rogers made, executed and delivered to W. H. Rogers on February 28, 1899, their certain deed conveying fee simple title to the following described tract of land:

Starting at N. E. corner of the Rogers tract, running South 880 yards; thence West 374 yards; thence North 308 yards; thence West 66 yards; thence North 572 yards; thence East 440 yards; to starting point, containing 75 4/5 acres, more or less.

On the same day and date, W. N. Rogers, J. W. Rogers and F. E. Rogers made, executed and delivered to J. F.

Rogers their certain deed conveying the fee simple title to the following described tract of land:

63 Being a part of the G. A. Thomas Headright Survey, starting at the N. E. corner of Lot No. 2, which is the N. W. corner of the W. H. Rogers tract, Lot 1, running West 440 yards to Wiley Davis N. E. corner; thence South 880 yards; thence East 224 yards; thence North 310 yards at 12 deg. East of North; thence East 754 yards to W. H. Rogers line; thence North 572 yards to starting point, containing 68-1/5 acres, more or less, with all the improvements thereon.

On the same day and date J. F. Rogers and W. H. Rogers made, executed and delivered to J. W. Rogers and F. E. Rogers their certain deed conveying fee simple title to the following described tract of land:

Being a part of the G. A. Thomas Headright Survey #175, starting at the S. E. corner of the Rogers tract, running North 880 yards; thence West 374 yards; thence North 308 yards; thence West 220 yards; thence South 310 yards at 12 deg. West of South; thence West 224 yards; thence South 880 yards; thence East 880 yards to starting point, containing 176 acres, more or less.

7. J. H. Simmons, in making the survey for W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers, prior to the execution of said deeds, began at the northeast corner of said G. A. Thomason Survey and measured west along the north line of said Thomason Survey a distance of 440 yards, set a stake and then measured south a distance of 880 yards, and then measured east a distance of 440 yards. From this work on the ground J. H. Simmons prepared the distribution contained in the deed from the three brothers to W. H. Rogers, covering tract No. 1 of 75-4/5 acres.

In making a survey on the ground for tract No. 2 J. H. Simmons began on the north line of the Thomason Survey at a point 440 yards west of the northeast corner of said survey, being at the point he had determined as the northwest corner of tract No. 1, and ran a line west along the north line of said Thomason Survey a distance of 440 yards and there set a stake for the northwest corner of Lot No. 2, and told the four Rogers boys, who were accompanying him on the survey, that there was a chain left between the point where he had stopped and set the stake, after measuring 880 yards from the northeast corner of said Thomason Survey and the northwest corner of their land, after measuring 880 yards from the northeast corner of the survey it was about one chain (66 feet) to the northwest corner of their land, which corner, from
a fair inference from the evidence, was the
64 northeast corner of the Wiley Davis land, though the surveyor Simmons did not mention the Davis corner to the Rogers boys at the time of the survey; neither did he survey to said corner; nor did he endeavor to locate said corner at the time he was making the partition for the Rogers boys. The four Rogers boys, viz., W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers, who were with said J. H. Simmons, informed him that they would leave the 66 feet out of the partition and use the same jointly and keep it like it was; the same 66 foot tract was then being used in part as a logging road.

At the time of the partition, the east one-half of the Thomason Survey "was rated at 320 acres", and when Mr. Simmons was employed to make the survey, he was told by F. E. Rogers that the four Rogers boys, who were the owners, wanted him to divide the land into four 80-acre blocks. After J. H. Simmons set the stake for the northwest corner of tract No. 2 at a distance of 880 yards from the northeast corner of the Thomason Survey, he measured South a distance of 880 yards and there set a stake, at a ponit now evidenced by the old gear wheel,

placed there soon thereafter as a corner stake, where it has remained for more than thirty years. The deeds to partition the four 80-acre blocks for the heirs of Rogers were prepared from the survey made upon the ground by J. H. Simmons, though the south portion of the partition was from a calculation. The field notes were not prepared for several days after the survey was made upon the ground.

8. The Court finds that in the field notes contained in the deed from W. H. Rogers, J. W. Rogers and F. E. Rogers to J. F. Rogers covering tract No. 2, no mention was made of the stake which J. H. Simmons drove in the ground on the north line of the Thomason Survey 880 yards west of the northeast corner of said Thomason Survey, nor was any mention made in the field notes contained in said deed to the stake driven in the ground at a point 880 yards south and 880 yards west of the northeast corner of the G. A. Thomason survey.

9. The Court finds that a few years after the stake was driven in the ground by J. H. Simmons at a point 880 yards west and 880 yards south of the northeast corner of the G. A. Thomason Survey, as the southwest corner of Tract No. 2, such stake was removed and an iron gear shaft was driven in the ground at the place where said stake was originally placed by J. H. Simmons, and said gear shaft was found in the ground at the time this cause was tried and has been there for some 30 years, and said gear shaft is at a point 880 yards west of the east line of the Thomason Survey, and 880 yards south of the North line of said Thomason Survey. However, the gear shaft was not mentioned in any conveyance introduced in evidence at the time Complainant, Empire Gas & Fuel Company, acquired its oil and gas lease, but the gear wheel was observed and noted by the surveyors of the Complainant, Empire Gas & Fuel Company before it took its corrected

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lease, to correct the field notes of the land which it actually claimed under the W. P. Chandler lease and which was actually covered by the W. P. Chandler lease herein referred to.

10. About 1900, J. F. Rogers died, leaving surviving him his wife, Mrs. L. J. Rogers, and two children, Elvie, who later married Azzie Waskom, and J. E. Rogers as his sole surviving heirs at law, and no administration was had upon his estate and no necessity existed therefor and at the time Mrs. L. J. Rogers and her children executed said oil and gas lease under which Complainant, Empire Gas & Fuel Company, claims title, the said lessors in said lease were the owners in fee simple of the land described in the deed from W. H. Rogers, et al, to J. F. Rogers, dated February 28, 1899.

11. On May 7, 1917, Mrs. L. J. Rogers and her two children, Elvie Waskom and J. E. Rogers made, executed and delivered to J. W. Mings their certain deed conveying and vesting in the said J. W. Mings fee simple title to the following described tract of land:

Beginning at the N. W. corner of our 68-acre tract, said beginning corner is about 953 vrs. west of the N. E. corner of said G. A. Thomason H. R. Survey; thence East 147 feet to corner on the N. E. line of G. A. Thomason Survey, witness P. O. tree about 12 in. dia. brs. W. 5 feet; thence South with fence 757 feet to corner, said corner being 21 feet S. E. of S. E. corner of residence; thence west 115 feet to E. side of Union Grove public road, witness B. J. tree bears N. about 10 deg. East 75 feet; thence with meanderings of said road to the place of beginning, containing about two acres of land, more or less.

The above tract of land is located north of the 66 foot strip claimed by Complainant and Respondents. Complainant and Respondents have not asserted any right,

title or interest in or to the land covered by the deed from Mrs. L. J. Rogers and her children to J. W. Mings above described.

66 12. On October 20, 1930, said heirs of J. F. Rogers executed an oil, gas and mineral lease to W. P. Chandler using the same description contained in the said deed from W. H. Rogers, et al, to J. F. Rogers, excepting said two (2) acre J. W. Mings tract last above described, and stating "it being the intention to include all land owned or claimed by Lessors in said survey." Said lease was assigned to Complainant, and is now owned by it and is a valid and subsisting lease.

13. On May 8, 1931, said heirs of J. F. Rogers executed to Empire Gas & Fuel Company a correction lease containing the following description:

Being a part of the G. A. Thomas headright. Starting at the N. E. corner of Lot No. 2 which is the N. W. corner of the W. H. Rogers tract No. 1; thence N. 39 deg. 44' W. a distance of 1228.19 ft.; thence S. 0 deg. 56' W. a distance of 726.32 ft., thence S. 80 deg. 59' W. a distance of 118.34 ft., thence S. 1 deg. 03' E. a distance of 1919.14 ft., thence N. 89 deg. 30' E. a distance of 728.89 ft., thence N. 10 deg. 36' E. a distance of 940.45 ft., thence N. 88 deg. 31' E. a distance of 462.24 ft., thence N. 1 deg. 29' W. a distance of 1715.64 ft., to the point of beginning, said tract to contain 66-1 5 acres, more or less. It being the intention of the lessor herein to lease all land owned by them in said survey, and containing 66-1 6 acres, more or less.

This lease is now owned by the substitute Complainant which, together with its predecessors, took possession of the land therein described, drilled wells for oil thereon, produced and is producing oil therefrom, and has paid the rentals and royalties therein provided. However, none of the parties have drilled any wells on the land in

controversy. By conveyances from the said heirs of J. F. Rogers, introduced in evidence, Curtis M. Willock is the owner of one-fourth (¼) of the minerals and J. B. Parker of one-thirty-second (1/32) of the minerals under the land partitioned to J. F. Rogers, subject to Complainant's said lease, each owning a proportionate part of the royalties payable under such lease.

The northwest corner of the W. H. Rogers tract No. 1, referred to as being at the Northeast corner of Lot No. 2 in the correction lease given by the heirs of J. F. Rogers to the Empire Gas & Fuel Company, Complainant, was located at a point 440 yards west of the northeast corner of the G. A. Thomason Headright Survey No. 175.

14. The Court finds that J. F. Rogers never acquired title under the partition deed executed February 28, 1899, to the strip of land situated between a line run South from the Wiley Davis northeast corner
67 and a line run South from a point 880 yards west of the northeast corner of the Thomason Survey to the gear shaft. The Court find that J. F. Rogers never acquired title under said deed to said strip, but that all land lying between a line run south from the Wiley Davis Northeast corner and a line run south from a point 880 yards west of the northeast corner of said Thomason Survey was not covered by said deed. When Mrs. L. J. Rogers and her two children made, executed and delivered to W. P. Chandler, on October 20, 1930, the oil and gas lease under which Complainant claims title to the strip, said Mrs. L. J. Rogers and her children did not own the fee simple title to all of said strip of land, but said fee simple title was then owned by the said heirs of Louisa Rogers, deceased.

15. The Court finds that the oil, gas and mineral lease and leasehold estate of Complainant, Empire Oil & Refining Company, originally executed in favor of W. P.

Chandler, dated November 18, 1930, does not cover nor include any land west of a line running north from the old bevel gear and said oil and gas lease does not cover and include the 66 foot strip situated between the line running south from the Wiley Davis northeast corner, wherever situated, and a line running south from a point on the north line of the Thomason Survey 880 yards west of the northeast corner to the gear shaft, and that the West line of plaintiff's lease coincides with the East line of the Dunlap lease.

16. The Court finds that the call for the Wiley Davis northeast corner contained in the partition deed from W. H. Rogers and others to J. F. Rogers, dated February 28, 1899, was inserted through mistake, and the Surveyor set a stake 880 yards west of the northeast corner of said Thomason Survey, and another stake south at 880 yards where the gear shaft now stands, to mark the west line of the J. F. Rogers tract, although the partition deed did not call for said two stak The Court finds that the stake set by Simmons on the north line 880 yards from the northeast corner disappeared prior to the trial of this cause.

17. The Court finds that the oil and gas lease under which Respondent, B. P. Dunlap, claims, covers and includes such strip of land 66 feet wide and complainant's oil and gas lease, nor its purported corrected lease, do not cover said strip. The ratification or correction lease covers the same land as the original lease, the only difference being a change from yards to feet in the description calls and a correction of an obvious error in one
68 of the calls of the original lease. Such was the representation at the time the correction lease was obtained, and such correction lease called to begin as follows: "Being a part of the G. A. Thomason Headright, starting at the northeast corner of Lot No. 2, which is the northwest corner of the W. H. Rogers tract No. 1";

and the Court finds that the northwest corner of W. H. Rogers tract No. 1 was partitioned and surveyed at the time of the partition to be at a point 440 yards west of the northeast corner of the G. A. Thomason Headright Survey.

18. Sometime prior to the date Mrs. L. J. Rogers and her son and daughter executed the oil and gas lease to W. P. Chandler, J. W. Rogers died intestate and left surviving him as his sole heirs at law his two brothers, W. H. Rogers and F. E. Rogers and the heirs of a deceased brother, J. F. Rogers, to-wit: Mrs. L. J. Rogers, J. E. Rogers and Elvie Rogers Waskom.

19. The Court finds as a fact that the surveyors of the Complainant testified that there was an ambiguity in the partition deed and in the lease of the Complainant when it was attempted to be applied to the ground, and, upon such admission of ambiguity, the Court heard evidence as to the footsteps of the original survey at the time of the partition and as to the intent of the parties in making such instruments.

Conclusions of Law.

1. The Court concludes from the foregoing facts that Complainant's bill is without equity. The oil and gas lease of Respondent, Dunlap, does not constitute a cloud on the title of Complainant, Empire Oil & Refining Company, to the tract of land covered and included in the oil and gas lease executed by Mrs. L. J. Rogers, et al, to W. P. Chandler, dated October 20, 1930. The oil and gas lease owned and held by Respondent, B. P. Dunlap, covers and includes the tract of land lying immediately west of and adjacent to the lands covered by the said oil and gas lease of Empire Gas & Refining Company.

2. That the call for the Wiley Davis corner in the partition deed of 1899 and subsequent instruments following

such deed call, should be rejected as inserted by mistake, and controlling effect should be given to course and distance from the known and undisputed northeast
69 corner of the Thomas Survey and other known and undisputed corners, line trees and corners agreed to be correct at the trial, for such construction is most consistent with the intention of the parties to the deeds from the entire description and the equities of the case from all the facts, and is most consistent with the construction of the calls by the parties themselves, as evidenced by their acts and conduct over a period of about 30 years subsequent to the date of the partition and prior to discovery of oil in East Texas.

3. The Respondent Dunlap is entitled to have the title to such tract of land quieted as against Complainant on his plea for affirmative relief.

4. The Court concludes that extrinsic evidence was admissible to show that the surveyor Simmons, at the time he made the partition survey, placed a stake at a point 880 yards west of the northeast corner of the said Thomason Survey for the northwest corner of the J. F. Rogers tract, and another stake 880 yards south thereof at a point now, and for more than 30 years, located by the old gear wheel. Also, extrinsic evidence was admissible to prove that one of the stakes was removed and the gear-shaft placed where said stake was originally driven, as the Court concludes that the correction lease obtained either does not cover the 66 feet involved in this controversy or it takes in more land than it was represented to cover at the time it was obtained.

The correction lease and the original lease, separately and taken together, when application of the calls is made to the land on the ground, create an ambiguity and, when taken in connection with the description of the partition deed to J. F. Rogers, create an ambiguity. If effect is

given to the call "thence west 440 yards to the northeast corner of the Wiley Davis tract; thence south 880 yards; thence east 224 yards; thence north 310 yards at 12 deg. E. of north; thence East 54 yards to W. H. Rogers' line; thence North to the beginning, it would leave out a strip of land 68 feet wide west of the J. F. Rogers old fence, along the line North 310 yards at 12 deg. E. of North; for, if you run from the southwest point, as claimed by the complainant herein, at a point 880 yards
70 south of the northeast corner of the Wiley Davis tract of land, and then run East 224 yards (the call in the original partition deed and in the original lease to W. P. Chandler and in the assignment from Chandler to the complainant), there will be 68 feet between J. F. Rogers' fence and the call distance; then to run north 310 yards at 12 deg. east of north, there will be 68 feet between the line as called for and as surveyed and the fence line of the Rogers tract of land. This ambiguity, from all the facts, compels the conclusion that the intention of the parties was not to take in the 68 feet west of the gear wheel, in controversy, and that it was purposely left out of the partitioned land. Furthermore, when the complainant, Empire Gas & Fuel Company, represented to the heirs of J. F. Rogers that their correction lease did not cover any more land than the original lease, and thereby obtained the same, it is in no position now to claim otherwise, in an equitable action. In other words, if the complainant were entitled to rely on the call to the Wiley Davis corner, at the north, it would be confined to the call of 224 yards east from the point 880 yards south of the said corner, and a strip of 68 feet would be outside the calls of their lease, along the east side thereof. They cannot take an excess of land at the north and also take an excess at the southeast. Complainant, as a matter of equity, cannot claim that its correction lease covers the land on the east and also on the west, when the original lease either covered the land on the east or the land on the west, but not both.

Complainant's original lease either stopped at a point 880 yards west of the northeast corner of the Thomason Survey and ran south to the gear wheel—that is, it ran west from the northwest corner of Lot No. 1, partitioned to W. H. Rogers (which point was 440 yards west of the northwest corner of the G. A. Thomason Headright Survey No. 17'); thence west 440 yards; thence south 880 yards; thence east 224 yards; thence north 310 yards, at 12 deg. E. of north; thence east 154 yards to W. H. Rogers' line—or it ran west to Wiley Davis' northeast corner, south to M. O. Sheppard 36-acre northeast corner; thence east 224 yards for corner; thence north 12 deg. East 310 yards for corner; thence east 154 yards to W. H. Rogers' line.

71 In other words, the original lease either left outside its calls the land claimed by the defendants herein on the west, or does not cover the land claimed by the defendants on the east. The correction lease, not taking in more land than the original lease, could not be extended on the west and also be extended, at the southeast corner, to the east, 68 feet.

The complainant cannot claim, in an equity suit, under two instruments represented by it to cover the same land, when to give effect to complainant's contention would be to extend the calls of the original instrument beyond its calls and to take in and include land not covered by the original instrument.

(Signed) RANDOLPH BRYANT.

(Entered April 30, 1938.)

Findings of Fact and Conclusions of Law Filed May 2, 1938.

OBJECTIONS AND EXCEPTIONS OF COMPLAINANT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

72 (Title Omitted.)

May it please the Honroable Court:

Complainant files and presents the following objections and exceptions to the Court's findings of fact and conclusions of law heretofore filed in this cause:

I.

Complainant objects and excepts to all of section 7 of the Court's findings of fact and conclusions of law for the following reasons:

(1) There is no competent testimony to support said finding because the testimony that the surveyor set stakes introduced by defendants over complainant's objection varied and contradicted the terms of the partition deed to J. F. Rogers and the oil and gas lease to Chandler and said testimony was in derogation of the estate granted, in that the deed and lease did not call for stakes but called for course and distance and an adjoinder with the Wiley Davis Northeast corner. The partition deed and lease having called for the Wiley Davis Northeast corner and not having called for stakes, parol testimony was not admissible to show that the surveyor set stakes short of the Wiley Davis Northeast corner;

(2) The finding is against the overwhelming weight and great preponderance of the credible testimony because the field notes in the handwriting of the surveyor introduced in evidence showed that the surveyor did not measure across the North line of the East one-half of said Thomason Survey but measured across the South line of

the North one-half of the East one-half of said
73 survey to the Bozeman line, which line was well known to the surveyor and was the East line of the West one-half of said survey;

(3) The finding is based on incompetent and inadmissible testimony, because there was no evidence introduced showing that the complainant knew that the surveyor did not actually survey to the Wiley Davis Northeast corner, and there was no testimony introduced showing that complainant knew that the heirs of Louisa Rogers instructed the surveyor to stop short of the Wiley Davis Northeast corner for the purpose of leaving unpartitioned a strip of land for a road;

(4) The finding is contrary to the allegations of defendants' answer wherein they plead that the surveyor never surveyed the West line of the tract of land partitioned to J. F. Rogers.

(5) The finding that the 66 foot strip was being used in part as a logging road is unsupported by any competent testimony because all the testimony showed that the 66 foot strip was being used for a road.

II.

Complainant objects and excepts to all of section 9 of the Court's findings of fact and conclusions of law for the following reasons:

(1) There is no competent testimony to support said finding because the testimony that the surveyor set stakes introduced by defendants over complainant's objection varied and contradicted the terms of the partition deed to J. F. Rogers and the oil and gas lease to Chandler and said testimony was in derogation of the estate granted, in that the deed and lease did not call for stakes but

called for course and distance and an adjoinder with the Wiley Davis Northeast corner. The partition deed and lease having called for the Wiley Davis Northeast corner and not having called for stakes, parol testimony was not admissible to show that the surveyor set stakes short of the Wiley Davis Northeast corner;

74 (2) The finding is against the overwhelming weight and great preponderance of the credible testimony because the field notes in the handwriting of the surveyor introduced in evidence showed that the surveyor did not measure across the North line of the East one-half of said Thomason Survey but measured across the South line of the North one-half of the East one-half of said survey to the Bozeman line, which line was well known to the surveyor and was the East line of the West one-half of said survey;

(3) The finding is based on incompetent and inadmissible testimony, because there was no evidence introduced showing that the complainant knew that the surveyor did not actually survey to the Wiley Davis Northeast corner, and there was no testimony introduced showing that complainant knew that the heirs of Louisa Rogers instructed the surveyor to stop short of the Wiley Davis Northeast corner for the purpose of leaving unpartitioned a strip of land for a road.

III.

Complainant objects and excepts to the last paragraph of section 13 of the Court's findings of fact because the said finding is not supported by any competent and admissible testimony and is against the overwhelming weight and great preponderance of the credible testimony.

IV.

Complainant objects and excepts to all of sections 14 and 15 of the Court's findings of fact and conclusions of law for the following reasons:

(1) There is no competent testimony to support said finding because the testimony that the surveyor set stakes introduced by defendants over complainant's objection varied and contradicted the terms of the partition deed to J. F. Rogers and the oil and gas lease to Chandler and said testimony was in derogation of the estate granted,
in that the deed and lease did not call for stakes
75 but called for course and distance and an adjoinder with the Wiley Davis Northeast corner. The partition deed and lease having called for the Wiley Davis Northeast corner and not having called for stakes, parol testimony was not admissible to show that the surveyor set stakes short of the Wiley Davis Northeast corner;

(2) The finding is against the overwhelming weight and great preponderance of the credible testimony because the field notes in the handwriting of the surveyor introduced in evidence showed that the surveyor did not measure across the North line of the East one-half of said Thomason Survey but measured across the South line of the North one-half of the East one-half of said survey to the Bozeman line, which line was well known to the surveyor and was the East line of the West one-half of said survey;

(3) The finding is based on incompetent and inadmissible testimony, because there was no evidence introduced showing that the complainant knew that the surveyor did not actually survey to the Wiley Davis Northeast corner, and there was no testimony introduced showing that complainant knew that the heirs of Louisa

Rogers instructed the surveyor to stop short of the Wiley Davis Northeast corner for the purpose of leaving unpartitioned a strip of land for a road;

(4) The finding is contrary to the law when applied to the other findings of the Court because the Court has found that the 66 foot strip was being used as a road at the time of the partition and has found that the course and distance calls of the field notes in the partition deed to J. F. Rogers extended only to the East (inner) edge of said road. Therefore the Court should have found that the title to said strip passed to J. F. Rogers under the partition deed subject to the easement, it being the law that where a road is wholly laid out on property of the grantor, the grantee will take fee title to all the road where the field note description goes to the inner edge of said road.

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V.

Complainant objects and excepts to all of section 16 of the Court's findings of fact and conclusions of law for the following reasons:

(1) There is no competent testimony to support said finding because the testimony that the surveyor set stakes introduced by defendants over complainant's objection varied and contradicted the terms of the partition deed to J. F. Rogers and the oil and gas lease to Chandler and said testimony was in derogation of the estate granted, in that the deed and lease did not call for stakes but called for course and distance and an adjoinder with the Wiley Davis Northeast corner. The partition deed and lease having called for the Wiley Davis Northeast corner and not having called for stakes, parol testimony was not admissible to show that the surveyor set stakes short of the Wiley Davis Northeast corner;

(2) The finding is against the overwhelming weight and great preponderance of the credible testimony because the field notes in the handwriting of the surveyor introduced in evidence showed that the surveyor did not measure across the North line of the East one-half of said Thomason Survey but measured across the South line of the North one-half of the East one-half of said survey to the Bozeman line, which line was well known to the surveyor and was the East line of the West one-half of said survey; and there was no evidence of a mistake in inserting the call for the Wiley Davis Northeast corner.

(3) The finding is based on incompetent and inadmissible testimony, because there was no evidence introduced showing that the complainant knew that the surveyor did not actually survey to the Wiley Davis Northeast corner, and there was no testimony introduced showing that complainant knew that the heirs of Louisa Rogers instructed the surveyor to stop short of the Wiley Davis Northeast corner for the purpose of leaving unpartitioned a strip of land for a road;

(4) The finding is based upon testimony improperly admitted against complainant, said testimony being that the surveyor set a stake at a place where the gear
77. shaft now stands. The heirs of Louisa Rogers partitioned to J. F. Rogers a tract of land described in the deed as follows: "starting at the Northeast corner of Lot No. 2, which is the Northwest corner of W. H. Rogers tract, Lot 1; running West 440 yards to Wiley Davis Northeast corner; thence South 880 yards". If the distance of the North line of said tract partitioned to J. F. Rogers was extended 66 feet, said line would reach the Wiley Davis Northeast corner and by accepting the call for adjoinder and rejecting the call for distance, the metes and bounds description would cover and include the 66 foot strip. Complainant having acquired its title under a chain of transfers of record calling for an

adjoinder with the Wiley Davis Northeast corner was an innocent purchaser and entitled to rely upon the call for said adjoinder as fixing the Northwest corner of the tract of land partitioned to J. F. Rogers and leased by the heirs of J. F. Rogers to W. P. Chandler. Complainant was entitled to rely upon the presumption of law that where owners executed partition deeds they intended to partition all the land and not leave small, irregularly shaped tracts unpartitioned and was further entitled to rely upon the presumption that the parties intended to partition the whole tract of land because there was no express exception of said 66 foot strip. There was no testimony introduced showing that complainant knew that the distance of the North line called for in the partition deed would not reach the Wiley Davis Northeast corner.

VI.

Complainant objects and excepts to all of section 17 because the finding is not supported by competent evidence and is against the great weight of credible testimony.

VII.

Complainant objects and excepts to all of section 19 because parol testimony was not admissible to show the grantors in the partition deed inserted the call for the Wiley Davis Northeast corner through mistake.

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VIII.

Complainant objects and excepts to the Court's conclusions of law for the following reasons:

(1) Said conclusions are based upon improper findings of fact;

(2) Said conclusions are erroneous statements of law under the Court's findings of fact because the Court found that the 66 foot strip was being used for a road; that fee title to said 66 foot strip was owned by the Rogers' heirs prior to their partition of the East one-half of said survey; that the course and distance calls of the field notes in the partition deed to J. F. Rogers went to the inner edge of said road. Under said findings of fact the Court should have concluded as a matter of law that, even though the call for the Wiley Davis Northeast corner was disregarded, J. F. Rogers acquired title to said 66 foot strip because the field notes in his partition deed extended to the edge of said road;

(3) Complainant being an innocent purchaser under a chain of transfers calling for the Wiley Davis Northeast corner was entitled to rely upon said call for adjoinder and parol testimony was not admissible against it to show that the call for the Wiley Davis Northeast corner was inserted through a mistake of the Rogers heirs. Complainant was entitled to rely upon the presumption of law that where owners executed partition deeds they intended to partition all the land and not leave small, irregularly shaped tracts unpartitioned and was further entitled to rely upon the presumption that the parties intended to partition the whole tract of land because there was no express exception of said 66 foot strip. There was no testimony introduced showing that complainant knew that the distance of the North line called for in the partition deed would not reach the Wiley Davis Northeast corner.

(4) The conclusions of law are improper and erroneous when applied to the findings of fact because the Court found that the 66 foot strip was owned by the heirs of Louisa Rogers but was not covered and included in the partition deed to J. F. Rogers. The testimony
79 showed that the heirs of J. F. Rogers who executed an oil and gas lease to W. P. Chandler,

owned an undivided one-third interest in the land inherited by J. F. Rogers from Louisa Rogers and therefore owned an undivided one-third interest in the 66 foot strip under the Court's findings of fact aforesaid. The oil and gas lease executed to W. P. Chandler contained a clause: "it being the intention to include all land owned or claimed in said survey." Under the Court's own findings of fact the lessors owned an undivided one-third interest in said 66 foot strip and therefore complainant acquired the interest of said lessors under the aforesaid clause in said oil and gas lease.

Wherefore, complainant presents the above and foregoing objections and exceptions to the Court's findings of fact and conclusions of law and prays that the said objections and exceptions be sustained and that the findings of fact and conclusions of law be set aside.

H. J. PATTERSON,
PHILLIPS, TRAMMELL, ESTES, EDWARDS & ORN,
CLAYTON L. ORN,
Attorneys for Complainant.

Objections and Exceptions of Complainant to Findings of Fact and Conclusions of Law. Filed June 14, 1938.

COMPLAINANT'S REQUEST FOR ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

80 (Title Omitted.)

May it Please the Honorable Court:

Complainant, believing that the findings of fact of the Honorable Court are insufficient for proper review of this cause by the Honorable Circuit Court of Appeals, respectfully requests the Court to make additional findings

of fact upon the material facts hereinafter set out and respectfully requests the Court to adopt the paragraphs hereinafter set out as a part of the Court's findings of fact:

I.

The Court finds from the evidence introduced and the agreement of the parties made during the trial of this cause, that the tract of land conveyed and covered by the deed from Augustus Rogers to Louisa Rogers of September 6, 1882, is that portion of the G. A. Thomason Survey lying East of a line beginning 967 varas West of the Southeast corner of the Thomason Survey, and extending North to the Northeast corner of the M. O. Sheppard 36 acre tract and thence North, intersecting the North line of the said G. A. Thomason Survey at a point 982.4 varas West of the Northeast corner of said survey. The Court further finds that the field notes as located on the ground and the boundaries of the tract of land conveyed to Louisa Rogers aforesaid covered and included the 66 foot strip of land involved in this controversy, it being the intention of the grantor in said deed to convey the East one-half of said G. A. Thomason Survey and it further being agreed between the parties to this lawsuit that the East one-half was separated from the West one-half by a line running from a point 967 varas West of the Southeast corner of the Thomason Survey North to the Northeast corner of the M. O. Sheppard 36 acre tract and thence North intersecting the North line of said Thomason Survey at a point 982.4 varas West of the Northeast corner of said survey.

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II.

The Court finds that on February 28, 1899, immediately preceding the date W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers executed the deeds, they, as

heirs of Louisa Rogers, owned in fee simple the East one-half of the said G. A. Thomason Survey, the West boundary line of said East one-half being a line starting at a point 967 varas West of the Southeast corner of said Thomason Survey, extending North to the Northeast corner of the M. O. Sheppard 36 acre tract and thence North intersection the North line of said G. A. Thomason Survey at a point 982.4 varas West of the Northeast corner of said survey. The Court finds that on said date the said four Rogers heirs owned the 66 foot strip of land in controversy, said strip being a part of the East one-half of said Thomason Survey.

III.

The Court finds that on February 28, 1899, J. W. Davis (commonly called Wiley Davis) owned a tract of land in the Northeast corner of the West one-half of the said Thomason Survey, the said tract of land owned by the said Wiley Davis being fully described in a deed from J. T. Victory et al. to J. W. Davis, dated October 17, 1891. The Northeast corner of the Wiley Davis tract of land was a well established and well marked and identified corner and said corner was located 982.4 varas West of the Northeast corner of survey 175, and 964 varas East of the Northwest corner of Survey 175. The Court finds that in 1899 the Wiley Davis Northeast corner was witnessed by a pine tree and the East line of said Davis tract was well marked by marked trees.

82. IV.

The Court finds that in 1899, J. H. Simmons and F. E. Rogers knew the locations of the Northeast corner of the Wiley Davis tract of land described in the deed from J. W. Victory et al to the said J. W. Davis. The Wiley Davis Northeast corner in said date was located 982.4 yaras West of the Northeast corner of the said Thomason Sur-

vey 175 and 964 varas East of the Northwest corner of said survey.

V.

The Court finds that on February 28, 1899, W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers intended to divide and partition all of the land they owned in the Thomason Survey by inheritance from their mother, Louisa Rogers, and said heirs owned said 66 foot strip in controversy. The said heirs intended to partition to J. F. Rogers Tract No. 2, described in the deed from W. H. Rogers et al to J. F. Rogers, and purposely and intentionally inserted the call for the Wiley Davis Northeast corner, and intended for the Northwest corner of said tract No. 2, partitioned to J. F. Rogers to be coincident with the Northeast corner of the J. W. (Wiley) Davis tract of land. The said Rogers heirs further intended for the West line of said Tract No. 2 and the East line of the J. W. Davis tract and the East line of the Bozeman tract to be conterminous, because they did not intend to leave unpartitioned the said 66 foot strip then and now being used as a road, said strip being situated along the West side of the tract they had inherited from their mother, Louisa Rogers, and a part of said tract of land owned by Louisa Rogers, being covered and included in the field note description in her deed.

VI.

The Court finds that at the time of the partition aforesaid, on February 29, 1899, there was a public road along the West side of the East one-half of said Thomason Survey. A line run North from the gear shaft (the present location of which was undisputed by the parties to this lawsuit) would define the East side of said road and the West side of said road was the West line of the East one-half of said Thomason Survey aforesaid. The Court

finds that said road, as located, was being used in 1899 and is now being used as a neighborhood outlet and road. The 66 foot strip of land involved in this
83 controversy was used as a road in 1899 and said strip has continuously, to this date, been used as a neighborhood road and outlet.

VII.

The Court finds that the East line of the tract of land conveyed by W. B. Hagan to B. M. Bozeman on November 18, 1858, and described as being the Southeast one-fourth and 11¾ acres of Northwest one-fourth of Survey 175, as located on the ground, begins at the agreed corner of the M. O. Sheppard 36 acre tract and goes North to the Northeast corner of said 36 acre tract and then North along a line drawn to the Northeast corner of the J. W. Davis tract; that a line drawn North from the Northeast corner of the M. O. Sheppard 36 acre tract to the Wiley Davis Northeast corner would constitute the East boundary line of the B. M. Bozeman land.

VIII.

The Court finds that in 1899 J. H. Simmons knew the location on the ground of the B. M. Bozeman tract of land in the Thomason Survey aforesaid and knew the location of the East line of said tract, the said J. H. Simmons having, prior to 1899, made a survey of said Bozeman tract, the said Simmons having actually run out on the ground, prior to 1899, the East line of said Bozeman tract. The Court finds that the East line of the said Bozeman tract is West of the West line of the 66 foot strip of land involved in this controversy.

IX.

The Court finds that when J. H. Simmons prepared the deed from W. H. Rogers et al to J. F. Rogers, covering tract 2 (Exhibit 6), the description used was made partly

from the work he had done in the field, according to the field notes (Exhibits 45, 46) and partly from an office survey. The first call in the deed begins "at the Northeast corner of Lot 2, which is the Northwest corner of the W. H. Rogers tract Lot 1." The surveyor knew where the Northwest corner of Lot 1 was located on the
84 ground, having actually gone to the corner, and marked trees at such corner. The next call is "running West 440 yards to Wiley Davis Northeast corner." The surveyor did not actually go on the ground and run the line West 440 yards, but he knew where the Wiley Davis Northeast corner was located, and intended for the Northwest corner of Tract No. 2 to be coincident with the Northeast corner of the Wiley Davis tract, and made the call in the deed for the purpose of partitioning all the land. The surveyor did not go on the ground and run the line in the call "thence South 880 yards" but he did run a line from a point on the East line of survey 175, 880 yards South of the Northeast corner, West to the Bozeman line. The Bozeman line is directly South of the Wiley Davis Northeast corner and the surveyor knew where the Bozeman line was located, having actually gone on the ground to the Bozeman line as shown by his field notes. He also knew where the Wiley Davis Northeast corner was located on the ground, and knew it was North of the Bozeman line, and that a line projected South from the Wiley Davis Northeast corner would run along the Bozeman line, (dividing the East one-half of survey 175 from the West one-half of said survey. The Northeast corner of the Wiley Davis Tract is North of the Southwest corner of tract No. 2, and said Wiley Davis Northeast corner is Northwest of the gear shaft which respondents contend marks the Southwest corner of tract 2. The surveyor did not actually run on the ground the call "thence East 224 yards" nor did he run on the ground the call "thence North 310 yards at 12 degrees East of North." The surveyor actually did run on the ground the East line of tract No. 2, which is the West line of tract

No. 1, and located on the ground the Northeast corner of Tract No. 2, which is the Northwest corner of Tract No. 1, and the evidence shows that all of the parties to this lawsuit, ever since they have been connected with their respective titles, have recognized, used and adopted the most Southerly Southeast corner of Tract No. 2, a point 278.3 vrs. East of the East line of the Bozeman tract, as shown on Exhibit 14 point E. The evidence further shows that the surveyor did not locate on the ground the line called "thence North 310 yards at 12 deg. East
85 of North" nor the call "thence East 154 yards to W. H. Rogers line," but that all of the parties to this lawsuit ever since they have been connected with the title, have recognized these two lines as being located at the places shown on Exhibit 14.

The Court finds as a fact that there was partitioned to J. F. Rogers the land claimed in the bill of complaint. That the Southwest corner of said tract, called for in said deed, when located on the ground, is 31.3 vrs. (87 feet) West of the gear shaft, and the Northwest corner is coincident with Wiley Davis' Northeast corner, and when located on the ground would be 31.3 vrs. (87 feet) West of a line run North from the gear shaft to the North line of the survey.

The Court finds that the defendants only claim the land situated 66.89 feet West of the gear shaft, and formed by running lines from the gear shaft, and from said point 66.89 feet West of the gear shaft, North until said lines intersect the North line of said survey, less 2 acres conveyed by the Rogers to Mings, and that complainant has sought to quiet its title only to the land claimed by defendants. Title to the land situated 7.6 vrs. West of a point 23.7 vrs. (66 ft.) West of the gear shaft, and lying West of a line North from said point West 23.7 vrs. of gear shaft to the North line of the survey is not in dispute in this suit.

X.

The Court finds that the tract of land partitioned to W. H. Rogers as Tract No. 1 (Exhibit 17) as located on the ground, begins at the Northeast corner of survey 175, and the line goes South along the East line of survey 175, a distance of 880 yards to a point witnessed by a red oak (it being agreed at the trial of the cause the red oak witnessed the Southeast corner of Tract 1); then the line as located on the ground runs West 404 vrs. (374 yards, the call distance being 374 yards); then North a distance of 334 vrs. (309 yards, the call distance being 308 yards); then West 71 vrs. (65.7 yards, the call distance being 66 yards); thence North to a point where said line intersects the North line of Survey 175, 487 vrs. West of the Northeast corner and then East 487 vrs. (450.9 yards, the call distance being 440 yards) to the place of beginning.

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Exhibit 14 correctly locates the boundaries of Tract No. 1, partitioned to W. H. Rogers, as said boundaries are located.

XI.

The Court finds that complainant, Empire Oil & Refining Company, owns and holds an oil and gas lease upon all the land owned by the lessors, Mrs. L. J. Rogers, et al., located in the said Thomason Survey and that the lease from Mrs. L. J. Rogers and others to W. P. Chandler, dated October 20, 1930, covered and included all land the lessors owned in the Thomason Survey. The Court finds that it was the intention of the lessors to lease to the said lessee the 66 foot strip of land involved in this controversy; that said lessors and lessee intended for the call for the Wiley Davis Northeast corner to control the call for course and distance and said lessors intended to lease to the said W. B. Chandler all land they owned in

the said Thomason Survey lying South and East of the said Wiley Davis corner.

XII.

The Court finds that it wa the intention of the lessors in the oil and gas lease to W. P. Chandler, which said lease is now owned by complainant, to lease and let for oil and gas, exploration and mining, all the land owned in said Thomason Survey, by said lessors, the said lease containing the clause "it being the intention to include all lands owned or claimed by lessor in said surveys."

XIII.

The Court finds that it was not the intention of Mrs. L. J. Rogers and others, lessors in the oil and gas lease dated October 20, 1930, executed and delivered to W. P. Chandler, to except or exclude from the land leased the 66 foot strip of land in controversy. The Court finds that the said W. P. Chandler under said oil and gas lease,
87 acquired all right, title and interest of the said lessors to the strip of land in controversy in this lawsuit.

XIV.

The Court finds that the field notes of the tract of land partitioned to J. F. Rogers, being the same tract of land described in the oil and gas lease from Mrs. L. J. Rogers et al. to W. P. Chandler, when run on the ground, covers and includes the 66 foot strip of land involved in this controversy; that it was the intention of the grantors in said partition deed to partition and set aside to the said J. F. Rogers said 66 foot strip as a part of the land described in said partition deed; that it was the intention of the lessors in said oil and gas lease to W. P. Chandler, to include the said 66 foot strip as a part of the land de-

scribed in said lease. The Court finds that by accepting the call in the partition deed, and the subsequent instruments, for the Wiley Davis Northeast corner, and rejecting the call for distance, the intention of the parties executing such instruments will be more clearly carried out, the said parties using said description, having intended that the call for the Wiley Davis Northeast corner would control over calls for distance.

Wherefore, complainant presents to the Honorable Court the above and foregoing request for additional findings of fact and prays that the Court will make and find each of the foregoing facts, but that in the event the Court refuses to find each of the facts set out above to be true, then that the Court consider each request as a separate request and make a finding thereon.

H. J. PATTERSON,
PHILLIPS, TRAMMELL, ESTES.
EDWARDS & ORN,
CLAYTON L. ORN,
Attorneys for Complainant.

Complainant's Request for Additional Findings of Fact and Conclusions of Law. Filed June 14, 1938.

ORDER OVERRULING AND DENYING COMPLAINANT'S REQUEST FOR ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

88 (Title Omitted.)

On this day came the Complainant at a regular term of the Court, and at the same term at which the decree was entered, and presented its request for additional findings of fact and conclusions of law;

The Court having considered said request for additional findings of fact and conclusions of law and being of the opinion that said request should be denied;

It is therefore Ordered that Complainant's request for additional findings of fact and conclusions of law be and the same is hereby denied, to which action and ruling of the Court Complainant, in open Court, duly excepted.

Entered this the 13th day of June, A. D. 1938.

RANDOLPH BRYANT,
Judge Presiding.

Filed June 14, 1938.

ORDER OVERRULING COMPLAINANT'S OBJECTIONS AND EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

89 (Title Omitted.)

On this day, at a regular term of this Court, being the same term at which the decree was entered herein, came Complainant and presented to the Court its objections and exceptions to the Court's findings of fact and conclusions of law; and Complainant having excepted at the time the Court entered said findings of fact and conclusions of law, and the Court having granted Complainant permission to file said specific exception and objections, and the Court having considered said objections and exceptions, is of the opinion that they are not well taken and should be overruled.

It is therefore Ordered by the Court that the Complainant's objections and exceptions to the findings of fact and

conclusions of law are overruled and to the entering of findings of fact and conclusions of law Complainant in proper time duly excepted.

Entered this the 13th day of June, A. D. 1938.

RANDOLPH BRYANT,
Judge Presiding.

Filed June 14, 1938.

MOTION OF COMPLAINANT SUGGESTING CHANGE OF ITS NAME TO CITIES SERVICE OIL COMPANY.

90 (Title Omitted.)

Comes now Complainant, Empire Oil & Refining Company, and respectfully represents to the Court that on or about July 31, 1937, it changed its corporate name to Cities Service Oil Company.

Wherefore, it moves the Honorable Court for permission to proceed in this action under the name of Cities Service Oil Company.

H. J. PATTERSON,
PHILLIPS, TRAMMELL, ESTES, EDWARDS & ORN,
Attorneys for Empire Oil & Refining Company.

Filed May 2, 1938.

ORDER AUTHORIZING COMPLAINANT TO PROCEED IN CAUSE UNDER NAME OF CITIES SERVICE OIL COMPANY.

91 (Title Omitted.)

Order.

On this day came Complainant, Empire Oil & Refining Company and made known to the Court that it had changed its name to Cities Service Oil Company and moved that permission be granted to proceed in this action under the name of Cities Service Oil Company;

It is Ordered that Complainant may proceed in this action under its changed name, to-wit: Cities Service Oil Company.

Entered at Sherman, Texas, this 30th day of April, 1938.

RANDOLPH BRYANT,
Judge.

Filed May 2, 1938.

91½ NOTE TO CLERK of United States Circuit Court of Appeals:

Statement of the Evidence and Bill of Exceptions, with the Court's approval (pages numbered 94 to 299 inclusive of this Transcript of the Record) is bound under separate cover and is a part of this Transcript. The index to said Statement of the Evidence is found on pages numbered II to VIII inclusive, and the index pages refer to the typewritten numbered pages in said bound Statement of the Evidence.

99 In the District Court of the United States, for the Eastern District of Texas, Tyler Division.

Empire Gas & Fuel Company

vs. No. 803 Equity.

B. P. Dunlap, et al.

Be it Remembered, that on the 27th day of April, A. D. 1936, the above entitled and numbered cause came on for hearing before the Honorable Randolph Bryant, a United States District Judge in and for the Eastern District of Texas, at Tyler, Texas, and continued from day to day to its conclusion; the complainant being represented by David B. Trammell, Esq., of Fort Worth, Texas, Cecil Cook, Esq., of Houston, Texas, and H. J: Patterson, Esq., of Bartlesville, Oklahoma; the defendants by Angus Wynne, Esq., Longview, Texas; during the trial of which cause the following evidence was introduced, objections made and exceptions reserved by the respective parties:

The pleadings of the respective parties were read to the Court.

JOHN F. BAKER, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

"My name is John F. Baker and I live in Fort Worth, Texas. I am a surveyor and have been surveying land since 1924. I studied Civil Engineering for three
100 years at Texas A. & M. College and graduated in Civil Engineering at the University of Illinois. Since graduating I have been constantly engaged in surveying except for a period of one year."

Counsel for Defendants:

I think he is qualified.

(Direct Examination Resumed.)

By Counsel for Complainant:

"I have made a survey of the ground involving the location of the lines of the J. F. Rogers tract in the G. A. Thomason Survey in Gregg County. The surveying was done mostly in December, 1934, and January and February, 1935. Preliminary to making the survey, I made a title map, having been furnished with abstracts of title covering a number of tracts in the Thomason Survey. I had also been furnished with photostatic copy of the original field notes of the Thomason Survey, and the adjoining surveys, with the exception of the Hayden Edwards. I had copies of the patents also. I platted those descriptions from the patent on down to the present owners or as far as the title went, in order to make a working sketch, joining the calls for objects, distances, courses, etc. This map shows most of those calls. I made the title map before beginning my survey.

When I went on the ground I first made search for the original bearing trees called for at the corners of the Thomason Survey."

(In the preparation of this statement of the evidence, all acknowledgments of the exhibits hereinafter copied are omitted by agreement of the parties, there
101 being no controversy involved in the acknowledgments).

Counsel for Complainant:

We offer in evidence EXHIBIT No. 1.

The Court:

The exhibit is admitted in evidence and being in words and figures as follows:

"The State of Texas to M. Cartwright Assnee, Geo. A. Thomason.

Land Patent No. 414, Vol. 9.

Dated June 2, 1854.

Filed March 8, 1859.

Recorded Vol. H, page 352.

Deed Records Upshur County, Texas.

In the name of the State of Texas. To all to whom these presents shall come know ye I E. M. Pease, Governor of the State aforesaid by virtue of the power vested in me by law and in accordance with the laws of the said state in such case made and provided, do by these present grant to Matthew Cartwright, assignee of George A. Thomason his heirs or assigns, forever, six hundred and forty acres of land situated and described as follows: In Upshur County West of the Cherokee about 14 miles S 10 E from Gilmer by virtue of Certificate No. 143, issued by the Board of Land Commissioners of Jasper County on the 1st day of November, A. D. 1841, and transferred to said Cartwright on the 9th day of October, A. D. 1846, known as survey No. 175, beginning at the N E corner of No. 177 from which a sweet gum bears S 46 1/2 W 1 vara a post oak bears N 40 1/2 E 17 2/10 varas.

Thence South 1900 8/10 varas to a stake from which a pine bears S. 81 E 1 6/10 varas another bears South 1 vara;

Thence East 660 varas branch 1900 8/10 varas to a stake from which a black oak bears N 37 E 2 varas a pine bears N 17½ W 20 vara;

Thence North 1900 8/10 varas to the N W corner of No. 176 from which a pine bears S 19 W 14 6/10 varas another bears N 70 E 40 varas.

Thence West 1900 8/10 varas to the place of beginning. Thereby repinquishing the said Matthew Cartwright and his heirs or assigns forever all the right and title in and to said land heretofore held and possessed by the
102 said State and I do hereby issue this Leter Patent for the same.

In Testimony Whereof I have caused the seal of the State to be affixed as well as the seal of the General Land Office done at the City of Austin on the second day of June in the year of our Lord One Thousand Eight Hundred and Fifty-Four.

E. M. PEASE, Governor. L. S.

L. S. S. CROSBY, Commissioner of the Gl. Ld. Office."

(Direct Examination Resumed.)

By Counsel for Complainant:

"The Thomason Survey was surveyed on December 14, 1844, by C. D. Brooks and the field notes of the survey are the same as those contained in the patent.

I could not find any of the bearing-trees called for in the patent, although I tried to locate them. I ran all the lines of the survey, making search for the trees and for marked line trees that might have been made when the original work was done on the ground.

Not being able to find the bearing trees I located the corners of the survey by the fences which were used as the lines of the survey, where there were such fences, and used such fences to line up the corners.

At the Northeast corner, there is a fence running approximately North from the South and there is a fence continuing on North and a marked line to the East and a fence to the West.

At the Southeast corner, as it is used, and apparently located South of a new road, is a very old marked line North and South. There is a marked line to the West and a fence running West; but the road cuts the fence
103 off before the fence reaches the corner.

At the Southwest corner is a sweet gum. It is about in a line of a road to the North, although I do not believe the road now goes to that corner. It is in line of a road North of the Railroad.

At the Northwest corner I found evidences of possession, being a fence East and West. There is no fence North and South. The same ownership is found East of the line and West of the line.

Counsel for Complainant:

We offer in evidence EXHIBIT No. 2.

The Court:

The exhibit is admitted in evidence and being in words and figures as follows:

"Warranty Deed.

"M. Cartwright to Benj. N. Hampton.

Dated: May 18, 1855.

Filed: Aug. 22, 1859.

Recorded in Vol. H, page 563, Deed Records, Upshur Co., Tex.

"The State of Texas,
County of Upshur.

Know All Men By These Presents: That I, Matthew Cartwright, of said State and County of San Augustine, for and in consideration of the same of two Hundred Dollars, to me in hand paid by Benjamin N. Hampton, of said

State and County of Hopkins, the receipt whereof is hereby fully acknowledged, have granted, bargained, and sold and by these presents do grant, bargain, sell, alien, convey and deliver unto said Benjamin N. Hampton, his heirs and assigns, forever, six hundred and forty acres, the headright survey of George A. Thomason, secured to me said Cartwright by virtue of Patent No. 414, Vol. 9, dated at the City of Austin, 2nd day of June, A. D. 1854, as the assignee of said George A. Thomason.

104 To have and to hold said land and bargained premises, with all and singular the hereditaments and appurtenances unto the same belonging unto said Benjamin N. Hampton, his heirs or assigns forever, against myself, my heirs or assigns.

In testimony whereof, I hereunto set my hand and seal 18th day of May, A. D., Eighteen Hundred and Fifty-five, 1855.

M. CARTWRIGHT.

(Seal)

Witnesses:

F. V. McKEY (can't read)."

(Acknowledgment.)

Counsel for Complainant:

We offer in evidence EXHIBIT No 3.

The Court:

The exhibit is admitted in evidence and being in words and figures as follows:

"Deed.

"B. N. Hampton to Augustus Mosley.

Dated April 6th, 1853.

Filed: .....

Recorded Book D, page 499, Upshur County Deed Records.

The State of Texas,
County of Upshur.

Know All Men By These Presents: That I, Benjamin N. Hampton of the County of Hopkins in the State of Texas, for and in consideration of the sum of three thousand seven hundred and eighty dollars to me in hand paid by Augustus Mosley the receipt whereof is hereby acknowledged have this day bargained, sold and conveyed and do hereby bargain, sell and convey unto the said August Mosley all that certain tract or parcel of land situated and described as follows, to-wit:

In Upshur County on the waters of Moddies Creek about fourteen miles South from the town of
105 Gilmer described as follows to-wit:

Beginning at the N. E. corner of Survey No. 173, made for Benjamin N. Hampton, Administrator of the estate of George Hampton, deceased, a stake from which a pine bears S. 37 W 2 2 10 varas and another pine bears S 26 E 12 2-10 vrs.;

Thence West at 2850 varas a stake at the N. W. corner of a survey made for Benjamin N. Hampton, administrator of the estate of James Roark, deceased, N 174 a stake from which a black jack bears S 34 1/2 E 11 vrs. a black oak bears S 33 1/2 W 6 vrs.;

Thence South at 1900 vrs. the S. W. corner of said Survey No. 174 ac stke from which a pine bears S 87 E 7 vrs. a red oak bears N 61 E 8 8/10 varas;

Thence East at 1900 vrs. to a stake;

Thence South at 1900 vrs. a stake from which a pine bears S 8 1 E 1 6/10 varas and another pine bears *S 1 1 V*;

Thence East at 950 varas a stake on the South East corner of Survey No. 175;

Thence North 3800 vrs. to the place of beginning, containing twelve hundred and eighty acres of land and includes survey No. 173, containing two hundred and forty nine acres. Survey No. 174 containing one hundred and eighty eight acres of land and the East half of Survey No. 175 containing three hundred and twenty two and two thirds acres of land of the headright of Haden H. Edwards, together with all and singular the rights members hereditaments and appurtenances to the same belonging or in anywise incident or appertaining.

To Have and To Hold said premises herein before described unto the said August Mosley his heirs and assigns forever and I hereby bind myself, my heirs, executors and administrators to warrant and forever defend the title to said premises above described unto the said Augustus Mosley his heirs and assigns forever.

In Testimony Whereof, I have hereunto set my hand and seal using a scrawl instead of a seal on this sixth day of April, in the year of Christ one thousand eight hundred and fifty-three and word South interlined before signing.

B. N. HAMPTON. (Seal)

Test:

HEZEKIAH BARNES,
A. H. ABNEY."

(Acknowledgment.)

106 Counsel for Complainant:
We offer in evidence EXHIBIT No. 4.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Warranty Deed.

"A. Mosley to Alex Rogers

Dated: Apr. 2, 1855.

Filed: May 7, 1856.

Recorded in Vol. F, page 299, Upshur Co (Deed Records), Texas.

The State of Texas,
County of Upshur.

Know All Men By These Presents: That I, Augustus Mosley, of the State and County aforesaid, for and in consideration of the sum of Four Hundred and Eighty Dollars, the receipt of which I hereby acknowledge do hereby bargain, sell, alien and convey to Alexander Rogers, his heirs and assigns, a certain tract or parcel of land known as follows, the East half of survey No. 175 of G. A. Thompson Headright Certificate known as follows, commencing at the S. E. corner of Survey No. 175.

Thence N. 1900 vrs, to a stake from which a pine brs. S. 89 E. 7 vrs. a red oak brs. N. 61 88/20 vrs.;

Thence W. 950 vrs.;

Thence South 1900 vrs.;

Thence E. to the beginning containing three hundred and twenty acres of land, more or less.

To have and to hold the same unto the said Alexander Rogers his heirs and assigns forever, and I do hereby bind myself, my heirs, administrators, executors, and assigns, to warrant and defend the same to Alexander Rogers, his heirs and assigns, to warrant and defend the same to Alexander Rogers his heirs and assigns forever.

In testimony whereof I hereunto set my hand addixing a scroll for a seal this April 2nd, A. D. 1855.

A. MOSLEY. (Seal)

Test:

ELIZABETH BARNES,
E. L. DODSON."

(Acknowledgment.)

107 Counsel for Complainant:
We offer in evidence EXHIBIT No. 5.

The Court:
The exhibit is admitted in evidence and is in words and figures as follows:

"Warranty Deed.

"A. Rogers to Louisa Rogers.

Dated: Sept. 6, 1882.

Filed: Sept. 7, 1882.

Recorded: Vol. G, page 78, Deed Records, Gregg County, Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, Alexander Rogers, of the State and County aforesaid, for and in con-

sideration that I *bar* towards my wife Louisa Rogers, do hereby grant and convey to the said Louisa Rogers, her heirs and assigns, a certain tract or parcel of land known as follows:

The East half of survey No. 175 of G. A. Thomason's headright certificate known as follows:

Commencing at the S. E. corner of Survey No. 175;

Thence N. 1900 vrs. to a stake from which a pine brs. S. 89 deg. E. 7 vrs. a red oak brs. N. 61 deg. E. 8 8/10 vrs.;

Thence W. 950 vrs.;

Thence South 1900 vrs.;

Thence East to the beginning, containing three hundred and twenty acres of land, more or less.

To hav- and to hold the same unto the said Louisa Rogers, her heirs and assigns forever, and I do hereby bind myself to warrant and defend the same to Louisa Rogers, her heirs and assigns forever, one hundred acres of the said three hundred and twenty acres was given Louisa Rogers by her father the dead being made to me. I now releas- all clames to the said one hundred acres, the said three hundred and twenty acres being situated in Gregg County, Texas.

In testimony whereof I hereunto set my hand affixing a scroll for a seal this September 6th, A. D. 1882.

A. ROGERS. (Seal)

Test:

J. W. ROGERS,
W. H. ROGERS."

(Acknowledgment.)

108 Counsel for Complainant:

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Warranty Deed.

"W. H. Rogers, et al., to J. F. Rogers.

Dated February 28, 1899.

Filed February 10, 1900.

Recorded in Vol. "R," p. 59, Deed Records of Gregg Co., Tex.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, J. W. Rogers, W. H. Rogers and F. E. Rogers of the State and County aforesaid, do this day for and in consideration of fifty dollars in hand, the receipt whereof is hereby acknowledged, do sell, deliver and convey unto J. F. Rogers of the State and County above mentioned, the following described tract or parcel of ....., to-wit:

Being a part of the G. A. Thomas Headright Survey, starting at the N. E. corner of Lot No. 2, which is the N. W. corner of the W. H. Rogers tract, Lot 1;

Running West 440 yards to Wiley Davis N. E. corner; thence South 880 yards; thence East 224 yards; thence North 310 yards at *12 deg* East of North;

Thence East 754 yards to W. H. Rogers line;

Thence North 572 yards to starting point containing 68 1/5 acres, more or less, with all the improvements thereon, the title to said land warrant and defend unto said J. F. Rogers, his heirs and assigns forever binding myself, my heirs, assigns and legal representatives to do the same.

In testimony whereof we hereunto sign our names in the presents of the attesting Notary Public on this the 28th day of Feby., A. D. 1899.

W. H. ROGERS,
F. E. ROGERS,
J. W. ROGERS."

(Acknowledgment.)

109. Counsel for Complainant:

"It is agreed that the call running East along the South side of this tract involved should be 154 yards instead of 754 yards as indicated in the abstract."

Counsel for Complainant:

We offer in evidence EXHIBIT No. 7.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Instrument: Deed.

"Parties: J. F. Rogers, et al., to W. H. Rogers.

Dated: February 28th, 1899.

Filed: July 10th, 1915.

Recorded: Vol. 29, page 559, Deed Records, Gregg County, Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, J. F. Rogers, J. W. Rogers and F. E. Rogers, of the State and County aforesaid, for and in consideration of Fifty Dollars in hand, the receipt whereof is hereby acknowledged, do this day bargain, sell and convey all interest in the following described tract or parcel of land, unto W. H. Rogers, of the same state and county, to-wit:

Starting at the N. E. corner of the Rogers tract, running South 880 yards;

Thence West 374 yards;

Thence North 308 yards;

Thence West 66 yards;

Thence North 572 yards;

Thence East 440 yards to starting point, containing 75 4/5 acres, more or less,

With all the improvements thereon, in the G. A. Thomasons Headright Survey, the title to said land I warrant and defend unto said W. H. Rogers, his heirs, assigns, forever—binding myself, my heirs and assigns and legal representatives to the same.

In testimony whereof, we hereunto sign our names in the presence of the attesting witnesses, as Notary Public, on this the 28th day of Feby., A. D. 1899.

J. F. ROGERS,
110 F. E. ROGERS,
J. W. ROGERS."

(Acknowledgment.)

(Direct Examination Resumed.)

By Counsel for Complainant:

"In making the survey I had the field notes in the deed to J. W. and F. E. Rogers and had an abstract on such tract of land."

Counsel for Complainant:

We offer in evidence EXHIBIT No. 8.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Deed.

"J. F. Rogers, et al., to J. W. Rogers, et al.

Dated: February 28th, 1899.

Filed: December 18th, 1900.

Recorded: Vol. R, page 504-5, Deed Records of Gregg County, Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, J. T. Rogers, and W. H. Rogers, of the State of Texas and County aforesaid, for and in consideration of one hundred dollars in hand, the receipt whereof is hereby acknowledged, do this day bargain, sell and deliver unto J. W. and F. E.

Rogers my interest in the following described tract or parcel of -and, being situated in the same state and county above mentioned, to-wit:

Being a part of the G. A. Thomas Headright Survey No. 175, starting at the S. E. corner of the Rogers tract running North 880 yards;

Thence West 374 yards;

Thence North 308 yards;

Thence West 220 yards;

Thence South 310 yards at 12 deg. West of South;

Thence West 224 yards;

Thence South 880 yards;

111 Thence East 880 yards to starting point, containing 176 acres more or less, ——, the title to said land, I warrant and defend unto the said J. W. and E. F. Rogers, their heirs and assigns forever, binding myself, my heirs and legal representatives to do the same in testimony whereof we hereunto sign our names in the presents of the attesting Notary Public, on this, the 28th day of Feby., 1899.

J. F. ROGERS,
W. H. ROGERS."

(Acknowledgment.)

(Direct Examination Resumed.)

By Counsel for Complainant:

"In locating the J. F. Rogers tract, after I had failed to find anything original or very old and there being no bearing trees nor natural objects called for in the description of the J. F. Rogers tract in the partition, I made a search to try and locate the line between the East half and the West half of the survey. On the South line, as used for the Thomason Survey, I found a post oak, which

is a very old marked tree, probably established forty or fifty years ago. The post oak is located at the Southwest corner of the East half of the Thomason Survey. This post oak tree is called for in the deed from J. H. Simmons to M. O. Sheppard. J. H. Simmons was the County Surveyor in Gregg County and I have been told he is dead.

From this post oak, marked X on the North side, there are old blazes on the North side, East side, South side and West side. That post oak is called for in the deed from Simmons to Sheppard in 1902. From that post oak I ran North along parts of an old fence, now mostly down, and also along an old marked line until I came to a pine knot, with a small iron rod beside it, from which
112 a 15 inch red oak marked X bears South 43 West 5-6/10 varas. That red oak was called for in the deed from Simmons to Sheppard. The mark was similar to that on the post oak at the Southeast corner, although I do not think the mark is as old that on the post oak at the Southeast corner of the Sheppard tract."

Counsel for Complainant:

We offer in evidence EXHIBIT No. 9.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Warranty Deed.

"J. H. Simmons et ux to Mrs. M. O. Sheppard.

Dated May 27, 1902.

Filed: May 18, 1903.

Recorded: Vol. T, p. 542, Deed Records, Gregg County, Tex.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, J. H. Simmons and wife, J. A. Simmons, nee Bozeman, of the same State & County aforesaid, for and in consideration of One Hundred & Forty Four Dollars $144.00 cash in hand the receipt whereof is hereby acknowledged do this day bargain, sell, transfer and deliver unto Mrs. M. O. Sheppard of the same State and County above mentioned the following described tract or parcel of land, to-wit:

Being situated about 2 miles East of Gladewater in the State and County of Gregg and being a part of the G. A. Thomason H. R. S. as follows:

Beginning about 305 V. East of S. W. C. of the Thomas Survey which is C. I. witness trees sweet gum S. 55 deg. E. 6-3/5 v. & a red oak N. 51 deg. W. 10 V.;

Thence North across the T. P. C. Railroad 330 V. to C. 2 post oak N 55 deg. E. 7-1/5 V. & a sweet gum N. 50 deg. W. 7 V.;

Thence E. 645 V. to C. 3 Red Oak S. 43 Deg. W. 5-3/5 V. & a red oak S. 6 deg. W. 9-4/5 V.;

Thence South 324 V. to C. 4 Post Oak for corner & a post oak N. 14 deg. E. 7 V.;

113 Thence West 645 V. to place of beginning, containing 37-2/3 acres less 1-2/3 acres for right-way of railroad amount deeded 36 acres, the title to said land I warrant and defend unto said Sheppard his heirs & assigns forever, binding myself my heirs & assigns to do the same, it is further agreed that this sale is not to interfere with the lease to Rucker Munzesheimer Lumber Company.

In testimony whereof I hereunto sign my name in the presents of the attesting witness on this the 27" day of May, 1902.

J. H. SIMMONS,
J. A. SIMMONS."

(Acknowledgment.)

Counsel for Defendants:

"We agree that the red oak tree marks the Northeast corner of the M. O. Sheppard 36 acre tract."

(Direct Examination Resumed.)

By Counsel for Complainant:

"We ran a line from the corner witnessed by the red oak, North, running partly with an old road and partly along a fence. The fence is not straight nor is the road straight. There was a fence to the West of the line we ran and there was also a fence in places to the East of the line we ran. The location of the fence is shown on the map (Exhibit No. 14). We ran that line North to about the North line of the Thomason Survey as the North line is used. In running the line North we crossed the Gladewater-Longview public road. The road is shown on the map (Exhibit No. 14) being the diagonal line separating the Clark tract on the North from the Haynes tract on the South.

We used that line to determine the East line of the Wiley Davis tract. There were no fences along the East line of the Wiley Davis tract (now G. W. Clark)
114 the line being in a road. The line has been in the road ever since I have known it. The road had been recently graded and is a country road, approximately sixty feet wide.

There was a call in the partition deed to J. F. Rogers for the Northeast corner of the Wiley Davis tract. The line run as described, was used as the East line of the

Wiley Davis tract (now G. W. Clark land). The call in the partition deed to J. F. Rogers was to begin at the Northeast corner of Tract Uo. 2 (J. F. Rogers tract), the Northwest corner of a tract No. 1 (W. H. Rogers tract). We located the Northwest corner of the W. H. Rogers tract as being at an iron in an old road as called for in the deed from W. H. Rogers to Mrs. E. L. Walker in 1910. That is the iron rod that is in the line of the fence to the South and in the road.

If the line of the fence running from the South were projected North it would miss the iron rod at the Northwest corner of the W. H. Rogers tract about a vara. The deed from W. H. Rogers to Mrs. E. L. Walker calls for the iron rod and the rod is about 1 vara West of the line of the fence to the South. I found a 2 inch iron pipe now driven around the rod.

Counsel for Complainant:

We offer in evidence EXHIBIT No. 10.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

115 "Deed.

"W. H. Rogers, et al., to Mrs. E. L. Walker.

Dated: November 23, 1910.

Filed: November 26, 1910.

Recorded: Vol X, page 278, Deed Records, Gregg County, Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That we, W. H. Rodgers and wife, Lizzie Rodgers, and W. A. Wright of

the County of Gregg, State of Texas, for and in consideration of the sum of Seventy-five dollars, paid by Mrs. E. L. Walker, out of her own individual and private estate, receipt of which is hereby acknowledged, have granted, sold and conveyed, and by these presents do grant, sell and convey, unto the said Mrs. E. L. Walker of the County of Gregg, State of Texas, all that certain tract or parcel of land, situated in the county of Gregg, State of Texas, to-wit:

Being a part of the G. A. Thompson Survey and beginning at a stake in west line of the old Merrill tract;

Thence West 487 varas to an iron stake at corner of a field;

Thence North 298 varas to a stake, an iron in an old road;

Thence East 487 varas to a stake in west line of aforesaid Merrill tract;

Thence South 298 varas to place of beginning, containing in all 25.68 acres of land.

To have and to hold the above described premises, together with all and singular the rights, and appurtenances thereto in anywise belonging, unto the said Mrs. E. L. Walker and heirs and assigns, forever; and we do hereby bind ourselves, heir, executors and administrators, to warrant and forever defend, all and singular the said premises unto the said Mrs. E. L. Walker, heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands, at Gladewater, this 23rd day of November, A. D. 1910.

W. H. ROGERS,
LIZZIE ROGERS,
W. A. WRIGHT."

(Acknowledgments.)

116 (Direct Examination Resumed.)

By Counsel for Complainant:

"I will trace and show you the location on the map of the tract of land described in the deed from W. H. Rogers, et al., to Mrs. E. L. Walker. The deed calls 'beginning at a stake in West line of the old Merrill tract.' I started there and the next call is 'thence West 487 varas to an iron stake at corner of a field.' I did not measure that line but I measured the North line of the tract and not the South line and that is the South line.

I did not find the stake at the Southwest corner but I found the field. There is a small drain at the Southwest corner where water runs through at about the fence corner. The next call is 'thence North 298 vrs. to a stake, an iron in an old road.' That iron is a stake with the pipe around it that I previously testified to. The next call is 'thence East 487 vrs. to a stake in West line of aforesaid Merrill tract,' and I measured that line. That line by actual measurement is 486 plus vrs. and I have indicated that in red pencil on the map.

The called distance is 487 varas in the deed from W. H. Rogers, et al., to Mrs. E. L. Walker, while the call in the deed from J. F. Rogers, et al., to W. H. Rogers, is 440 yards, thereby making the call in the deed executed in 1910 by W. H. Rogers, et al., to Mrs. E. L. Walker, about 12 varas longer than the partition deed to W. H. Rogers. I found at the Northeast corner of the tract described in the deed from W. H. Rogers to Mrs. E. L. Walker, a fence on the South and a fence to the West. The fence corners

117 where I located the corner on the map. I found at the Southeast corner a fence to the West. The twenty-five acres is fenced but the fence is not in good repair at this time and a part of the North line does not have a fence on it. Part of the North line is in a lane."

Counsel for Complainant:

We offer in evidence EXHIBIT No. 11.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Deed.

"E. L. Walker to J. W. Mings.

Dated: November 25th, 1910.

Filed: November 26th, 1910, 10:00 AM.

Recorded: Vol. X, page 278 D/R Gregg County, Texas.

Filed No. 15134.

The State of Texas,
County of Gregg.
Know All Men by these Presents:

That we, E. L. Walker and wife, Mrs. Nannie E. Walker, of the County of Gregg, State of Texas, for and in consideration of the sum of one hundred and ..... 125.00 Dollars to be paid and secured to be paid, by J. W. Mings, as follows:

Twenty-five $25.00 Dollars in hand paid cash and the execution of two (2) promissory notes bearing even date with this deed and due as follows: 1st note due the 1st day of November, A. D. 1911, 2nd note due the 1st day of November, A. D. 1912, for fifty dollars each with interest at the rate of ten (10) per cent per annum from date until paid, the receipt of which is hereby acknowledged, have granted, sold and conveyed, and by these presents, do grant, sell, convey unto the said J. W. Mings, of the County of Gregg, State of Texas, all that certain tract of land situated in the County of Gregg, State of

Texas, all that certain tract or parcel of land, situated in the County of Gregg, State of Texas, to-wit: Being a part of the Thomason Survey, and

Beginning at a stake in the West line of the old Merrill tract;

118 Thence West 487 vrs. to an iron stake at corner of a field;

Thence North 298 vrs. to a stake an iron pipe in an old road;

Thence East 487 vrs. to a stake in West line of aforesaid Merrill tract;

Thence South 298 vrs. to place of beginning, containing in all 25 68/100 acres of land.

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Mings and heirs and assigns forever; and we do hereby bind ourselves, heirs, executors, and administrators to warrant and forever defend all and singular the said premises unto the said J. W. Mings, heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

But it is expressly agreed and stipulated that the vendor's lien is retained against the above described property, premises, and improvements, until the above described notes, and all interest thereon are fully paid according to their face, tenor and effect, and recorded when this deed shall become absolute.

Witness our hand at Gladewater, this 25th day of November, A. D. 1910.

E. L. WALKER, M. D.,
NANNIE E. WALKER."

(Acknowledgments.)

Counsel for Defendants:

"I think those are admissible for locative purposes, but being subsequent deeds by other parties, they would not be binding on my client. The partition was in 1899; and this deed he is offering was in 1910."

Counsel for Complainant:

"The deed from W. H. Rogers would certainly bind him, he being a defendant in this lawsuit, and one of the claimants to this strip of land."

Counsel for Defendants:

"If it conflicts with W. H. Rogers in any way; but I don't think so."

119 Counsel for Complainant:

We offer in evidence EXHIBIT No. 12.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

Instrument: Warranty Deed.

Parties:

J. W. Mings, et ux. to Mrs. L. J. Rogers, et al.

Dated: May 7th, 1917.

Filed: May 11th, 1917.

Recorded: Vol. 32, pgs. 572-3, Deed Records of Gregg County, Texas.

The State of Texas,
County of Harrison.
Know All Men by these Presents:

That we, J. W Mings and wife, Addie Mings, of the County of Harrison, State of Texas, for and in consideration of the sum of one dollar and other good and valuable considerations to us paid, by Mrs. L. J. Rogers, Elvie Waskom (nee Rogers), and J. E. Rogers, as follows:

Cash in hand paid and exchange of property which is hereby acknowledged, have granted, sold and conveyed, and by these presents do grant, sell, and convey, unto the said Mrs. L. J. Rogers, Elvie Waskom *(nee* Rogers) and J. E. Rogers, of the County of Gregg, State of Texas, all that certain tract or parcel of land on the G. A. Thomason Survey.

Beginning at the N. W. corner of a 25 68/100 acre tract conveyed to us by E. L. Walker and wife, Nannie E. Walker, by deed dated Nov. 25th, 1910, recorded in Vol. X, pages 278, 279 Gregg County, Texas.

Thence E. 118 feet and 3 inches to corner witness P. O. tree 24 in. diam. brs. N. about 80 deg. W. 27 feet,

Thence S. 828 feet to the S. B. line of original tract to corner,

Thence W. 118 feet 3 inches to the S. W. corner of original tract, an iron pipe for corner,

Thence N. 828 feet, to the place of beginning, containing two acres, more or less.

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto, in anywise belonging, unto the said Mrs. L. J. Rogers, Elvie Waskom *(nee* Rogers), and J. E. Rogers, heirs and assigns forever, and we do hereby bind

ourselves, our heirs, executors and administra-
120 tors, to warrant and forever defend, all and singular the said premises unto the said Mrs. L. J. Rogers, Elvie Waskom and J. E. Rogers, their heirs and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

Witness our hands at Gladewater, this 7th day of May, A. D. 1917.

J. W. MINGS,
ADDIE MINGS."

(Acknowledgment.)

(Direct Examination Resumed.)

By Counsel for Complainant:

"I ran the North line of the tract described in the deed from J. W. Mings, et ux., to Mrs. L. J. Rogers, et al. There is a stump there that will meet the call for bearing tree when a line is run East of the line as described at the Northwest corner. The deed begins 'Northwest corner of a 25-68/100 acre tract conveyed to us by E. L. Walker and wife, Nannie E. Walker' and runs to a corner witnessed by a post oak. The stump I found was a post oak stump and it would meet the call running East from that iron stake I found. The next call is 'thence South 828 feet to the S. B. line of original tract to corner.' There was no fence running along the East line. The next call is 'thence West 118 feet 3 inches to the S. W. corner of original tract, an iron pipe for corner.' I did not find anything there other than evidence of possession and the fence corner. The fence runs about North and South and about East and West. The next call is 'thence North 828 feet to the place of beginning, containing 2 acres, more or less.' I measured that line and found it to be 298 vrs., which I have put on the map. That is 828 feet.

I have marked on the map the post oak stump where I found it.

121 I used that iron as described for the Northwest corner of the W. H. Rogers tract.

Mrs. L. J. Rogers sold to Mings in 1917 a two acre tract out of the Northwest corner of a 68-1/5 acre tract."

Counsel for Complainant:

We offer in evidence EXHIBIT No. 13.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Deed.

Mrs. L. J. Rogers to J. W. Mings.

Dated: May 7, 1917.

Filed: May 10, 1917.

Recorded: Vol. 32, page 563, Deed Records, Gregg County Texas.

The State of Texas,
County of .....
Know All Men by these Presents:

That we, Mrs. L. J. Rogers, wife of J. F. Rogers, dec'd, Elvie Waskon (nee Rogers) daughter of J. F. Rogers, deceased, and J. E. Rogers, a son of J. F. Rogers, deceased, all the heirs at law of J. F. Rogers, deceased, of the County of Gregg, State of Texas, for and in consideration of the sum of One ($1.00) Dollar, and the exchange of property to us paid by J. W. Mings, as follows:

One ($1.00) Dollar cash in hand paid the receipt of which is hereby acknowledged, also the exchange of property this day made is acknowledged, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said J. W. Mings, of the county of Harrison, State of Texas, all that certain tract or parcel of land, being a part of the G. A. Thomason H. R. Survey and described as follows, to-wit:

Beginning at the NW corner of our 68 acre tract, said beginning corner is about 953 vrs. West of the NE. corner of said G. A. Thomason H. R. survey;

Thence East 147 feet to corner on the N. B. line of G. A. Thomason survey, witness PO. tree about 12 in. dia. brs. W. 5 feet;

Thence South with fence 757 feet to corner, said corner being 21 feet SE. of SE. corner of residence;

Thence West 115 feet to E. side of Union Grove Public Road, witness B. J. tree brs. N. about 10 deg. East 75 feet;

122 Thence (North) with meanderings of said road to the place of beginning, containing about two acres of land, more or less. Said tract of land being situated in Gregg County, Texas.

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said J. W. Mings, his heirs and assigns forever, and we do hereby bind ourselves, our heirs, executors, and administrators to warrant and forever defend, all and singular the said premises unto the said J. W. Mings, his heirs and assigns,

against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands at Gladewater, this 7th day of May, A. D. 1917.

MRS. L. J. ROGERS,
J. E. ROGERS,
AZZIE WASKOM,
ELVIE WASKOM."

(Acknowledgments.)

(Direct Examination Resumed.)

By Counsel for Complainant:

"I attempted to locate the two acre tract described in the deed from Mrs. L. J. Rogers to Mings. In locating this tract I found a bearing tree near the Northeast corner of the two acre tract which I took for the bearing tree called for in the deed. The tree is marked X on the East side and is a post oak. It was about 16 inches in size and if the deed called for a 12 inch post oak in 1917, in my opinion, the 16 inch tree I found would have been about 12 inches in 1917. From the appearance of the marks, my judgment is that the post oak that I found is the tree called for in the deed.

I did not find anything at the Northwest corner of the tract, the corner being in the road. When I was there the road was about 60 feet wide and it was a well graveled and muchly traveled road at that time. It had been graded recently but I would not say it had been recently graveled. The post oak tree is shown on the map.

123 I did not run around that tract but I ran the North line, the West line and the South line of it. I found a fence along the East line of the two acre tract. The deed calls for a fence as the East line, the call being 'thence South with fence 757 feet to corner.' I made the North line of the 2 acre tract the called distance. I used the corner witnessed by the bearing tree

to locate the North line and ran West the called distance of 147 feet, which would fall in the edge of the road.

On the Southeast corner of the 2 acre tract is an iron and a pipe also, I believe. There was a residence there at that time and the deed calls 'said corner being 21 feet Southeast of Southeast corner of residence.' It further calls 'thence West 115 feet to East side of Union Grove Public Road, witness B. J. tree, brs. North about 10 degrees East 75 feet.' I did not find that black jack but the 115 feet would be about the East edge of the traveled portion of the road. There was no fence corner at the Southeast corner of the 2 acre tract, there being no fence to the West. There was no fence on the South side of the 2 acre tract."

Counsel for Complainant and Defendants:

"It is agreed that the two acre tract was conveyed by Mings to Akin, and from Akin to George Clark; and Akin leased it; and the lease is now owned by the Sun Oil Company."

(Direct Examination Resumed.)

By Counsel for Complainant:

"We used that corner for the Northeast corner."

Counsel for Defendants:

"I am not agreeing to the location as placed by the Engineer, but only that the conveyances were made."

124 (Direct Examination Resumed.)

By Counsel for Complainant:

"From the Northeast corner of the 2 acre tract, as witnessed by the post oak, we ran the called distance along the North line (147 feet). We found that the point was about 3 varas East of a line we had run North from the Northeast corner of the M. O. Sheppard 36 acre tract. When a line is run West from the Northeast corner of

the 2 acre tract, as witnessed by the post oak bearing tree, West 5 feet, the called distance of 147 feet for the North line of the 2 acre tract, the Northwest corner of the 2 acre tract is located at a point in the edge of the road. There is a ditch along the side of the road, the ditch being between the traveled part of the road and the right of way fence. The distance of 147 feet took me into the ditch on the West edge of said ditch between the East edge of the road and the ditch. That point was 3 vrs. or 8½ feet, East of the line which I had run North from the Northeast corner of the M. O. Sheppard 36 acre tract. I used a line run from the Northeast corner of the Sheppard tract to the point 147 feet West of the point witnessed by the post oak as the West line of the J. F. Rogers 68-1/5 acre tract. I corrected my variations North, making a change of about five seconds and thereafter used such line as the North line. I did not calculate the acreage but the acreage used is merely descriptive.

I used the Northwest corner of the W. H. Rogers tract as the Northeast corner of the J. F. Rogers tract.

The distance from the Northwest corner of the J. F. Rogers tract to the Northeast corner of said tract at the iron pipe, as I had previously located it, is 495.4 vrs., which I have put on the map. That line is about
125 20 vrs. long over the call of 440 yards, which is 475 varas. There is a difference of about 20 varas.

I did not find anything at the Southwest corner of the J. F. Rogers tract in locating it as I have done. There is a country road running North along the J. F. Rogers tract from the Gladewater-Longview Highway. There was a fence as I recall at that time on the West side of the road, along the Clark tract. South of the Gladewater-Longview Highway along the West side of the J. F. Rogers tract, as I have located it, there was a fence West of the line which I ran South, which varied from ten to fifteen feet West of the line. There were parts of a fence East of the West line of the J. F. Rogers tract, as I ran it, and they are shown on the map. The fence

on the West of the line I ran is in the J. M. Haynes field. On the East of the line I ran is wire grown into the trees, as shown on the map. There were remains of a fence North that I noticed, but the fence was very crooked. The fence would have been East of the double dotted line I have shown for an old roadway. There was an old road along there but I cannot say how far the fence would have been from the Haynes field. It varied.

I located the South line of the Rogers tract and found a fence that has been used as the South line of said tract. Running East from the Southwest corner, as I have located it on the map (Exhibit No. 14) I went 278.3 varas along a fence. There was an old pine tree used as a fence corner, from which a fence runs generally Northwest.

126 There was a fence and evidence of a fence along the South line of the tract as I ran the South line but all the fence was not standing. The call is 224 yards, which would be 248 varas and I ran 278 varas, which would be 36 varas difference. I found at the Southeast corner where I stopped, a fence corner where an old fence partly down and partly up ran a little East and North. There was no fence running to the East or South there but there was a fence running back West.

I continued that line on to the East line of the Thomason Survey. I found there a pine knot with a small iron rod beside it and red oak bearing tree. The bearing tree was marked X but it was not called for in any field notes that I found. It was an old X.

We had left a point for approximately the Southwest corner of the W. H. Rogers tract, which is indicated on Exhibit No. 14, as "A". From that point we ran North across the Gladewater-Longview roadway. That point marked "A" is 404 varas West from the tree and a pine knot on the East line of the Thomason Survey just mentioned. The call in the partition deed to W. H. Rogers is 374 yards, which is 403-9/10 varas. I have marked the agreed Southeast corner of the W. H. Rogers tract with the letter "B" and the distance to point "A" is 404 varas.

From "A" we ran North 334 varas, which I put on the map. 334 varas is 309 yards and the call is 308 yards or 332-6/10 varas. That is about a yard and a foot longer than the call in the partition deed to W. H. Rogers but I found at that corner evidence of an old fence, there being wire grown in trees South of the highway. I have no note of any fence South of the highway. I found a fence North of the highway, some of the fence being old and some new. I have indicated the highway
127 with the letter "C". The fence North of the highway appeared to be an old fence. I stopped at 309 yards because that was approximately the called distance and I found at 309 yards a fence corner and a fence to the West and to the South. From there we ran over West to the line of the fence to the North a distance of 71 vrs. and the call is 66 yards which, converted into varas, is 71-3/10 varas. At that point I found a fence going to the North, which fence was a continuation of the fence along the West line of the two acre tract in the Northwest part of the Walker 25 acre tract. From that point there was a fence running approximately West. I found at the fence corner one-half inch iron rod in the line of the fence to the North and in the East and West fence, there was a 2 inch pipe 1½ vrs. North and 2 vrs. West of the iron rod. I ran later North along the East line of the J. F. Rogers 68 acre tract.

I ran a line West along a fence from the point 71 varas from where I had first turned West. The fence was an old one but some of it looked new and there were improvements in there. Houses and such are there but I cannot say how old the fence was. I ran the called distance of 154 yards. The fence is not running straight. From point D on Exhibit 14 I ran a line South 12 degrees West."

(Examination of Witness.)

By the Court:

"From where the two fences joined the North side of the 16 acre tract, I went West the called distance. That

did not bring me to anything exactly. The fence bends and it is crooked and it is not run out to any point.

From that point D running South 12 degrees
128 West, we found a fence that generally was near the line but not on the line. The fence was West of the line."

(Direct Examination Resumed.)

By Counsel for Complainant:

"We ran out to point D and on down South to see if the land was generally in possession or if there was evidence of possession. I ran the line as stated above and found there was a fence running generally along it but not exactly on the line. The fence was crooked and I have not figured out exactly how it would vary but it would cross the line part of the time and part of the time it would be West of the line and part of the time it would be East of the line. The fence did not approximate the line I ran but to generally follow the line of the fence it would take a course of about South 12½ degrees West, instead of South 12 degrees West. When I ran to point E, I made a connection to the fence corner down there. We then investigated in the Western part of the Thomason Survey to see if we might find any of the corners called for in the various deeds. At point D shown on the map I was North of the fence, as I recall. The fence cuts across the corner there and it is generally in line with the fence to the South. From point D, that is the fence I have spoken of as running on toward the Southwest that would have crossed the line. The line finally ended up at the fence corner for the Southeast corner of the J. F. Rogers tract, which I have marked on the map as point E.

I then ran the East line of the J. F. Rogers tract. There is a fence generally along the east line. I do not think the length of the East line. I would not say positively

that I actually measured it. I do not show it in
129 my notes. I know I ran a line to it but I won't say I measured it. I went from the Northeast

corner of the J. F. Rogers tract to the Wiley Davis tract (now G. W. Clark tract) and tried to locate the Wiley Davis tract because in the partition deed to J. F. Rogers the Northwest corner of the Rogers tract called for the Northeast corner of the Wiley Davis.

In locating the Wiley Davis Northeast corner I made quite a search and investigation of tracts and corners called for in deeds to the West half of the Thomason Survey. In making the investigation I had the field notes of the Bozeman partition made in 1891 and the other deeds I have indicated on my map (Exhibit No. 14). The calls in the partition deed and the other deeds are shown on my map. We found the bearing trees at the Northeast corner of the Sheppard 36 acre tract called for in the Bozeman partition deed and we found those corners in the deed from Simmons to Sheppard. Outside of those bearing trees I found none in the West one-half in trying to locate the Davis tract. We searched all the lines shown on the map."

Counsel for Complainant:

We offer in evidence map which has been marked Exhibit No. 14.

The Court:

The map is admitted in evidence, and is reproduced at the end of this statement of evidence.

(Direct Examination Resumed.)

By Counsel for Complainant:

"I have testified how I have located the Wiley Davis tract. There was no call at the Southwest corner of the Wiley Davis tract except for the road. I did not make a positive determination of the West line of the Davis tract. I made search in the vicinity for what-
130 ever there might be, bearing trees and such things, called for in the deed. I did not find the bearing trees called for at the Northwest corner in the

Wiley Davis deed. At the Northwest corner of the Wiley Davis tract (G. W. Clark tract) there is a road running from the South that makes a slight bend to the left to run a little to the Northwest and the road is about in line of an old road to the West and a line of a lane to the East. Taking the W. H. Rogers tract No. 1 and running around it, as I have located it on the ground, the tract would be excessive East and West on the North line. I find no appreciable excess in the South line of the W. H. Rogers tract No. 1, as I have located it. I find that the distance, as I have located the J. F. Rogers tract No. 2 from the most Northerly Southeast corner at point D to the most Southerly Southeast corner at point E, approximated the calls in the deed. As I have located it, the tract on the ground has an excess of around 36 yrs. from the most Southerly Southeast corner to the Southwest corner of the said J. F. Rogers tract.

In my opinion that is the way to reconstruct the survey, not being able to find any monuments on that South line.

Cross Examination.

Counsel for Defendants:

"We agree, on behalf of defendants, that at point B the red oak tree marks the East line of the Thomason Survey, which therefore makes no dispute about the Northeast corner as the witness locates it nor the Southeast corner as he locates it."

131 By Counsel for Complainant:

"Beginning at point B and running to point A there is practically no excess. Running from point A for the next call there is practically no excess, being 334 yrs. as located on the ground as against 332 yrs. as contained in the call. In the next call of 71 yrs. there is only a foot or two difference between the call and the line as I have located it on the ground, which is nothing to amount to anything. The next call over to D of 154 yrs., as I have located the line on the ground is about the same as the

call. From D, going South to E, there is no appreciable difference between the call and the distance of the line as I have located it. The difference begins when I go down to E and instead of going 224 yards as is called for in the field notes, I ran 278.3 vrs. I had the deed from Rogers to Burnett on the South. That call is for 224 yards here. The deed from Burnett to King and from King to Shell Petroleum Company also contains a call for 224 yards. The 224 yards will take one to the bevel gear there in the edge of the old road.

I know where the Simmons well is located and I have marked it on the map. As marked on the ground, the well is East of the heavy line I have shown and East of the fence and East of the old road.

At your request I have marked on the map a line beginning at the bevel gear and going down approximately where the old road makes the West line of the Alco Ryan 10 acre lease, as the lease is established on the ground. Also, from the bevel gear I have dotted a line to where I show the fence. That line shows the connec-
132 tion and the fence goes on down South and wanders around to the West. In going from the Northwest corner of tract No. 1, as I show the corner to be located on the ground, and running West 440 yards (475 varas), I have marked on Exhibit 14, with a blue line and an X above the line said point. From a point 440 yards West of the Northwest corner of tract No. 1, I took a connection to the bevel gear. I measured the distance to the bevel gear but not on that particular line. The difference between 475 varas (440 yards) and 495.4 varas is 20.4 vrs., which is less than a chain. A chain is 26-3/4 varas, or 66 feet. A vara is 2.78 feet.

As I have located the West line of the J. F. Rogers tract it is 34.3 varas West of the bevel gear, which is about 95 feet. I make it 95 feet from the bevel gear to the line of the Bozeman tract (now the Haynes tract). I know that the Haynes tract calls to run North from the Northeast corner of the M. O. Sheppard 36 acre tract. The Haynes fence is not directly on a line run North from

the M. O. Sheppard tract. I have the fence on the map as I found it. The dotted line represents the roadway as it has been traveled and the line with crosses represents the fences. There is a well located East of the heavy line but I do not find a fence East of the well that you speak of. I find parts of a fence. I have shown the fence on Exhibit 14. There is a well West of where I have shown part of the fence and East of the Haynes fence.

There is another well up North, called the Phillips well, which is East of the Haynes fence and in the road.

133 There are no dimensions on Exhibit No. 14 showing the result of an actual survey except such dimensions as have been placed on the map with red pencil. The dimensions shown on the map are the called distance.

I measured the Bozeman tract, having measured enough to make a search in the approximate locality for the location of the corner.

On Exhibit No. 14, I showed the call from the Northeast corner of Tract No. 1 to the Northwest corner of Tract No. 2, to be 487 varas, whereas the call in the field notes is 440 yards, or about 475 varas. I showed on the map the distance from the Northeast corner of tract No. 2 to the Northwest corner of tract No. 2 to be 495.4 varas, while the call in the deed is 440 yards or 475 varas. The distance shown from the actual survey does not correspond with the distances called for in the deed.

As I locate the East one-half of the survey, as called for in the patent, the North and South lines are more than 950 varas. The East one-half of the survey, as the distance is called for in the patent would be 950 varas on the North and South lines. I ran all of the lines of the survey but did not find any bearing trees at the Southwest corner. I did not establish the Southwest corner of the survey to be a fence, as I stated in the beginning of my testimony, the corners were located by evidence of usage, fences and possession and recognition of the lines.

I find no evidence showing that the Rogers' fence has ever been West of the gear wheel to the North. I find

no evidence of the Rogers fence going to the gear wheel.

134 My map does include the land West of where I found evidence of a fence as being within the Rogers tract. I could not say that it is true that the fence on the Rogers tract from the gear wheel North has left out a roadway 66 feet wide. I found a fence West of the road which is the Haynes fence. There is a fence that makes the East line of the Haynes tract and there is, as I recall, some fencing over on the West.

Q. And all of that fencing is East or runs approximately along straight from the gear wheel North, or a little bit West of the gear wheel North.

A. That is right."

(Examination of Witness.)

By the Court:

"From the gear wheel to point E, as I have located it on the ground, the distance is 247 varas, which is about 5 varas in excess of the called distance, if I accept the gear wheel as a corner and run the called distance of 224 yards (242 varas). The distance of 278.3 varas in red on the map is not from the gear shaft to point E but is from the West line, as I have located it. The distance of 278.3 varas is greater than the called distance of 224 yards by 36 varas."

(Cross Examination Resumed.)

By Counsel for Defendants:

"I have at your request indicated on Exhibit No. 14 a point 224 yards East of where I established the Southwest corner of the Rogers tract, which point is 242 vrs. East of point I have established as the Southwest corner. At your request I have run a line on the map from said point North 12 degrees East 310 yards. The next call in the partition deed to J. F. Rogers is East 154 yards. That

call would go from D as marked by that line to the W. H. Rogers West line.

135 From the work done on the ground, it clearly shows there is an excess distance in the North line. If a line is run West from the Northeast corner of the J. F. Rogers tract, as I have located it by the iron at the fence, to the Northwest corner of the J. F. Rogers 68-1/5 acre tract, as I have located it, there is an excess of about 20 varas. It is therefore evident that, by running the called distance I cannot get back to where I started. So I ran South from the Northwest corner of the 68-1/5 acre tract, as I had determined it, and ran the called distanee from the most Easterly Southeast corner of the tract and put the excess in the South line. We have possession along the East line of the J. F. Rogers tract as I have located it. The possession is from the line shown on Exhibit No. 14, DE. It is true that I followed possession in locating the East line of the tract but I did not follow possession in fixing the West line because I did not find possession in the form of a fence in the middle of the road. I found parts of a fence on the East side of the road.

Beginning at point B on Exhibit No. 14, the distance West, as I have located the line, is accurate with the call of the partition deed, the distance from point A on North likewise practically corresponds and the distance on the North is accurate. The distance to point D, running West, as I have located it, corresponds with the call of 154 yards and the distance from D to E, as I have located the line, corresponds with the called distance. All of the distances on the South line are approximately accurate with the distances in the deeds and 224 yards would approximately put the line at the gear wheel."

136 Counsel for Complainant:

"We object to any evidence concerning the gear wheel, because it is not called for in any title. I don't care to object to the testimony concerning that, except that it would have no weight."

The Court:

"What you are getting at is that he admits that the signs of possession, and all the distances called for along the South border are fairly accurate, and commensurate with the calls in the instruments of conveyance, except the last call on the South line to the West?"

Counsel for Defendants:

"Yes. And if you stop at 224 yards, you will be approximately in the old fence line, won't you?

Witness:

A. No, I don't find the old fence—"

The Court:

"What you mean is that if you extend a line North from that point 224 yards West of "E" that a fence extending along that line North will be fairly commensurate with the fence line that you find up there at the North; is that right?"

Counsel for Defendants:

"That is right. The fence he says he found on the South."

(Cross Examination Resumed.)

By Counsel for Defendants:

Q. Do you know where there is an old gear wheel in the road down there?

A. It is shown on the map."

137 Counsel for Complainant:

"May I have a general objection to all testimony concerning the gear wheel, as not being called for in any instrument in the whole record?"

(Cross Examination Resumed.)

By Counsel for Defendants:

If you came over 224 yards from "E", you would be close to where the old gear wheel is there?

A. Yes.

Q. And about some distance East of the point you have marked for the Southeast corner of the Empire lease?

A. Yes, of the Rogers tract."

(Examination of Witness.)

By the Court:

"Q. Didn't you testify that you found some evidences of an old fence, not at the point that you established as the Southeast corner of that 68 acre tract, not South of the bevel gear, but directly on up North and East of the line that you—

A. I showed two trees there, with wire grown into them.

The Court:

Q. "How did that point correspond with a line extended from there along to the bevel gear that you found on the ground?

A. Those trees would be some distance West of the bevel gear."

The Court:

"Q. How much West?

A. It would be an estimate."

138 The Court:

"Q. Well, what is your estimate?

A. Probably 15 varas. That is North of the bevel gear."

The Court:

"Q. That would leave you still approximately 20 varas East of what you have fixed as the Southwest corner of the 68 acre tract?

A. Yes."

Re-Direct Examination.

By Counsel for Complainant:

"In checking over the field notes and making a survey on the ground of the J. F. Rogers tract, there is a difference in the called dimensions in the partition deed, and the calls set up on the ground as I located them where I found they had been recognized.

When I started at point D and ran the calls going the ditance, I found no variance until I came to point E. If from point E I reversed the call and ran 224 yards West, I would not have been South of the Northwest corner of the J. F. Rogers tract No. 2, as I had located it on the ground. I would have had to go something over 30 varas further West to have been South of the Northwest corner of the J. F. Rogers Tract No. 2, as I had established it. In regard to the fence running North, the map shows three trees near the Southwest corner of the J. F. Rogers tract No. 2. I am sure there were parts of a fence North of there on the East side of the road; the fence was crooked and some of it was new and I made
139 no connection to it. I did not find any fence straight across up there and that is the reason I did not connect to it. I did not check the fence, therefore I cannot say whether there was any degree of accuracy of a line fence along there. I did find evidence of a fence in the trees as indicated at the Southwest corner on the map."

BEN E. RAMSEY, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

"My name is Ben E. Ramsey and I am an engineer, having graduated in 1930 from the Kansas State College in Civil Engineering. Since graduation I have had experience in surveying and have worked in the East Texas field since 1930. I am employed at this time by R. G. Armstrong, a surveyor, at Longview. At one time I was employed by the Empire Gas & Fuel Company, running a survey party in the East Texas field for about a year. I came to East Texas March 1, 1931.

I surveyed the J. F. Rogers lease. Ben Leuty was my immediate superior. I had field notes of the Empire lease when I made the survey, which lease is marked Exhibit 15. Based on that lease I made a survey of the tract. Exhibit 16 is a map that was made from notes that I took in the field."

Counsel for Complainant:

"We offer in evidence EXHIBIT No. 15."

The Court:

"The exhibit is admitted in evidence and is in words and figures as follows:

140 "Oil and Gas Mineral Lease.

Filed Nov. 18, 1930; Recorded Vol. 61, p. 295, Deed Records, Gregg Co.

This Agreement, made this 20th day of October, 1930, between L. J. Rogers (a widow), J. E. Rogers, A. S.

Waskom and wife, Elvie Waskom, lessor, (whether one or more) and W. P. Chandler, lessee, Witnesseth:

1. Lessor in consideration of Ten & no/100 Dollars ($10.00) in hand paid, of the royalties herein provided, and the agreements of lessee herein contained, hereby grants, leases and lets exclusively unto lessee for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipe lines, building tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, transport, and own said products, and housing its employees, the following described land in Gregg County, Texas, to-wit: being a part of the G. A. Thomas H. R. Starting at the NE. cor. of Lot No. 2, which is the NW. cor. of W. H. Rogers Tract Lot No. 1 running West 440 yards to Wily Davis NE. corner; thence S. 880 yds.; thence East 224 yards; thence North 310 yard at 12° East of North; then East 754 yards to W. H. Rogers line; thence North 572 yards to starting point, containing 68-1/5 acres, more or less, and being the same land described in a deed from J. W. Rogers, W. H. Rogers and F. E. Rogers to J. F. Rogers, Feby. 28, 1899, rec. Vol. "R" p. 59-60 Deed Records of Gregg County, Texas, save and except 2 acres out of the NW. cor. sold to R. M. Wood, it being the intention to include all land owned or claimed by lessor in said surveys.

2. Subject to the other provisions herein contained, this lease shall be for a term of ten years from this date (called "Primary Term") and as long thereafter as oil, gas or other mineral is produced from said land hereunder.

3. The royalties to be paid by lessee are: (a) on oil, one-eighth of that produced and saved from said land, the same to be delivered at the wells or to the credit of lessor into the pipe line to which the wells may be connected; lessee may from time to time purchase any royalty oil

in its possession, paying the market price therefor prevailing for the field where produced on the date of purchase; (b) on gas, including casinghead gas or other gaseous substance, produced from said land and sold or used off the premises or in the manufacture of gasoline or other product therefrom, the market value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells that royalty shall be one-eighth of the amount realized from such sale; where gas from a well producing gas only is not sold or used, lessee may pay as royalty $50.00 per well per year, and upon such payment it will be considered that gas is being produced within the meaning of Paragraph 2 hereof; and (c) on all other minerals mined and marketed, one-tenth, either in kind or value at the well or mine, at lessee's election, except that on sulphur the royalty shall be fifty cents (50) per long ton. Lessee shall have free use of oil, gas, coal, wood and water from lessor's wells, for all operations hereunder, and the royalty on oil, gas and coal shall be computed after deducting any so used. Lessor shall have the privilege at his risk and expense of
141 using gas from any gas well on said land for stoves and inside lights in the principal dwelling thereon out of any surplus gas not needed for operations hereunder.

4. If operations for drilling are not commenced on said land or before one year from this date the lease shall then terminate as to both parties, unless on or before such anniversary date lessee shall pay or tender to lessor or to the credit of lessor in Everett Banking Company Bank of Gladewater, Texas (which bank and its successors are lessor's agent and shall continue as the depository for all rentals payable hereunder regardless of changes in ownership of said land or the rentals) the sum of sixty six & 20/100 Dollars ($66.20) (herein called rental), which shall cover the privilege of deferring commencement of drilling operations for a period of twelve (12 months). In like manner and upon like

payments or tenders annually the commencement of drilling operations may be further deferred for successive periods of twelve (12) months each during the primary term. The payment or tender of rental may be made by the check or draft of lessee mailed or delivered to said bank on or before such date of payment. If such bank (or any successor bank), should fail, liquidate or be succeeded by another bank, or for any reason fail or refuse to accept rental, lessee shall not be held in default for failure to make such payment or tender of rental until thirty (30) days after lessor shall deliver to lessee a proper recordable instrument, naming another bank as agent to receive such payments or tenders. The down cash payment is consideration for this lease according to its terms and shall not be allocated as mere rental for a period. Lessee may at any time execute and deliver to lessor or to the depository above named or place of record a release or releases covering any portion or portions of the above described premises and thereby surrender this lease as to such portion or portions and be relieved of all obligations as to the acreage surrendered, and thereafter the rentals payable hereunder shall be reduced in the proportion that the acreage covered hereby is reduced by said release or releases.

5. If prior to the discovery of oil or gas on said land lessee should drill a dry hole or holes thereon, or if after discovery of oil or gas the production thereof should cease from any cause, this lease shall not terminate if lessee commences additional drilling or reworking operations within sixty (60) days thereafter or (if it be within the primary term) commences or resumes the payment or tender of rentals on or before the rental paying date next ensuing after the expiration of three months from date of completion of dry hole or cessation of production. If at the expiration of the primary term oil, gas or other mineral is not being produced on said land but lessee is then engaged in drilling or reworking operations thereon, the lease shall remain in force so long as operations are prosecuted with no cessation of more than

thirty (30) consecutive days, and if they result in the production of oil, gas or other mineral so long thereafter as oil, gas or other mineral is produced from said land. In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within one hundred fifty (150) feet of and draining the leased premises, lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances.

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6. Lessee shall have the right at any time during or after the expiration of this lease to remove all property and fixtures placed by lessee on said land, including the right to draw and remove all casing. When required by lessor, lessee will bury all pipe lines below ordinary plow depth, and no well shall be drilled within two hundred (200) feet of any residence or barn now on said land without lessor's consent.

7. The rights of either party hereunder may be assigned in whole or in part and the provisions hereof shall extend to the heirs, successors and assigns, but no change or divisions in ownership of the land, rentals or royalties, however accomplished, shall operate to enlarge the obligations or diminish the rights of lessee. No sale or assignment by lessor shall be binding on lessee until lessee shall be furnished with a certified copy of recorded instrument evidencing same. In event of assignment of this lease as to a segregated portion of said land, the rentals payable hereunder shall be apportionable as between the several leasehold owners ratably according to the surface area of each, and default in rental payment by one shall not affect the rights of other leasehold owners hereunder. If six or more parties become entitled to royalty hereunder, lessee may withhold payment thereof unless and until furnished with a recordable instrument executed by all such parties designating an agent to receive payment for all.

8. The breach by lessee of any obligation arising hereunder shall not work a forfeiture or termination of this

lease nor cause a termination or reversion of the estate created hereby nor be grounds for cancellation hereof in whole or in part save as herein expressly provided, if the obligation for reasonable development should require the drilling of a well or wells, lessee shall have ninety (90) days after ultimate judicial ascertainment of the existence of such obligation within which to begin the drilling of a well, and the only penalty for failure to do so shall be the termination of this lease save as to ten (10) acres for each well being worked on and/or being drilled and/or producing oil or gas to be selected by lessee so that each 10-acre tract will embrace one such well.

9. Lessor hereby warrants and agrees to defend the title to said land and agrees that lessee at its option may discharge any tax, mortgage or other lien upon said land and in event lessee does so, it shall be subrogated to such lien with the right to enforce same and apply rentals and royalties accruing hereunder toward satisfying same. Without impairment of lessee's rights under the warranty in event of failure of title, it is agreed that if
143 lessor owns an interest in said land less than the entire fee simple estate, then the bonus, royalties and rentals to be paid lessor shall be reduced proportionately.

In Witness Whereof, this instrument is executed on the date first above written.

her
L. J. X ROGERS,
mark
J. E. ROGERS,
A. S. WASKOM, (A. S. Waskom)
ELVIE L. WASKOM.

Witness:
The signature and mark of
L. J. ROGERS,
J. E. ROGERS,
A. S. WASKOM."

(Acknowledgments.)

Counsel for Complainant:
We offer the map, Exhibit No. 16, in evidence.

The Court:
The map is admitted in evidence, and is reproduced at end of this statement of evidence.

144 (Direct Examination Resumed.)

By Counsel for Complainant:
"The map is one of the J. F. Rogers lease. It is designated there L. J. Rogers lease. Ben Leuty and two chainmen were with me when I made the survey. Mr. Hoffsess ran the instrument. The survey was made the latter part of April, 1931. We drove out to the house of Mr. Rogers, one of the lessors. He went with us to all of the corners of his tract of land. He was with us at every corner but he might have been gone a few minutes during the entire time we were making the survey. I asked him if he would point out the corners to me and he did so. That was J. E. Rogers, one of the sons of J. F. Rogers. He took us to what he pointed out as the Southwest corner of his tract of land. He showed us an iron pin down there and said his Southwest corner was 66 feet West of that iron pin. That iron pin had a gear wheel on top of it and it is shown on Exhibit 16. I have marked it on the map as Point "A". He said that the pin and wheel had been placed there shortly after the surveyor had made the subdivision of that tract of land and that his corner was 66 feet West of that. I established the Southwest corner of the lease at a point 66 feet West of the gear wheel. It was 66 feet West of the gear wheel in an old road and the corner is shown on the map. Mr. Rogers was there with us.

From there I ran East along the old fence. The course and call is shown on my map. I have marked the corner that I established as the Southwest corner by the letter

"B". We tied into some trees but I do not know whether we marked any of the trees or not. I put an iron pipe at "B". I then ran 738.89 feet as indicated on my
145 map, along an old fence, which is also indicated on my map. I stopped at 738.89 feet because there is an old fence corner there that Mr. Rogers pointed out as his Southeast corner. From there we ran Northeast with the fence. We followed approximately the fence line. It is an old fence to the highway. The fence was not exactly straight. It is shown on my map. When I ran Northeast I stopped near a fence corner.

I have marked on my map point "C". Mr. Rogers said that the fence corner was his Southeast corner.

From "C" I ran to point "D", where I turned East again. From "C" to "D" I ran 940.45 feet and then turned East. I turned East because that was near the fence corner that Mr. Rogers pointed out as his East line. He pointed out the fence running East and West as being over on his land a few feet. He showed us his most Easterly Southeast corner. He showed us an iron pin there and I found it. I have marked that "E". That was close to a fence corner and the distance is shown there. It was within approximately 5 feet of a fence corner. The distance is 462.24 feet. From East I ran North with an old fence line a distance of 1715.64 feet. That is the line shown slightly Northwest, North 1 degree, 29 minutes West. I followed in general the course of the old fence there. The fence is shown on my map as I tied in it. At the Northeast corner is an iron pin which Mr. Rogers pointed out as his Northeast corner. The corner is approximately in line with the fence going South and the center of the East and West road. The road appeared to be an old one. We put a two inch iron pipe around the pin
146 that Mr. Rogers pointed out as his corner and he saw us do that. From there we ran West 1228.19 feet. At that point there was an old fence running South and we found a post oak tree which marked the Northeast corner of the two acre tract.

Counsel for Defendants:

"He has said that J. E. Rogers told him about a corner. My client's lessors are entirely different people and hold under the old gentleman. I think it is admissible against one of these defendants; but I don't think it is admissible against my client, and I object to it.

The Court:

All right, go ahead."

(Direct Examination Resumed.)

By Counsel for Complainant:

"I have marked the point where I found the iron pin Mr. Rogers pointed out as "F" on the map. At a distance from "F" 1228.19 feet, I found the old fence line running South and a post oak witness tree.

The lease said "excepting two acres out of the Northwest corner sold to Wood." I had then gotten to the two acre tract. I had a description of the two acre tract which I got from Ben Leuty. I ran around the 2 acres. I found at the Northwest corner of the J. F. Rogers tract, as I fixed it in the L. J. Rogers lease, and the Northeast corner of the 2 acre tract, a 16 inch post oak tree. It was five feet West of the corner. I have marked the location of the post oak tree in red. I think I put an iron bar or an iron rod or something there to make that corner. There was originally a stake there, which I found. It was rather an old stake and I put the pipe where the old stake was.

147 There was a fence running South from there. It was an old fence. I ran South 1 degree 29 minutes West 751.54 feet. The old fence is shown along that line. The fence is marked with a black line and some X's in it. At the Southeast corner of the 2 acre tract Mr. Rogers pointed out an iron rod there in the fence corner. That was a fence corner made by the fence running West. I stopped there at the point which I have marked "H". I did not run to another point West of

point "G" but turned Southward. The road is up West of "G" and North of "H" and was not surveyed but is platted in.

When I ran West from "H" I ran 117.07 feet, following the fence. There was a house close. It was approximately the called distance from "H" but the house had been moved according to Mr. Rogers. I could not see evidence that it had been moved. Instead of running West I ran along the old fence North 86 degrees 42 minutes West. The line fell in approximately the center of the road. There was a fence running North from there on the East side of the road. I have marked it on the map point "I". From point "I" I ran approximately South down the road. There was a fence on the East side of the road and went on the West side. These fences are indicated on my map. The road was 43 feet wide and we ran in approximately the center of the road. That would make the fence about twenty or twenty-five feet East of the line until the Gladewater Pike was reached. The fence on the East of the line I established, ran South, and went on East when it hit the Gladewater road. It did not go across the pike but turned down the highway toward Longview. I did not survey that fence
148 down there. Nor did I survey the fence down the road on the South side of the road.

I found another fence going South after I crossed the Gladewater road and the location of the fence is shown on Exhibit No. 16. The fence was about 22 feet East of the line I established after I crossed the Gladewater road. The fence varied as shown on my map. It was an old fence. As I came on South I came back to point "B", where I started from. The fence as indicated on the map ran to the old gear wheel."

Cross Examination.

By Counsel for Defendants:

"I did not say that Mr. Rogers told me the gear wheel was put there by the surveyor when he was making a

survey for the Rogers but I said that Mr. Rogers told me it was placed there shortly after the surveyor made his subdivision. I do not believe he said who placed it there.

Q. Did you survey from the Sheppard Northeast corner, marked by the post oak, which we have agreed upon here, North?

A. No.

"I do not know if the fence line on the West side of that road extends to that post oak and that all of the road East of the Haynes tract extends from the post oak tree on North to the highway. I did not measure to see. I did not try to locate the Wiley Davis Northeast corner. I have not figured how many acres in the tract as I located it.

I had a photostat copy of the lease.

"Q. It called for the line from "B" to "C" to be 224 yards, didn't it?

A. Yes.

149 Q. Or from "A" to "C"?

A. Yes.

"I did not make the map. I made the survey. I furnished the company the notes made on the ground. The notes called for feet. The lease did not call for feet.

I made no survey of the East line of the Haynes to ascertain whether all the road here comes off the Rogers land or not. I had nothing to do with drawing the ratification or fixing it and I do not know who did. I do not know whether they took the field notes that I furnished or not."

BEN D. LEUTY, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination:

By Counsel for Complainant:

"My name is Ben D. Leuty and I live at Bartlesville, Oklahoma. I am an engineer for the Empire Company. I graduated from the Texas A. & M. in 1924 in Civil Engineering. I have been surveying for the Empire Company and doing all kinds of engineering work since graduation. I have worked in Texas since 1929 and have done surveying in East Texas field. I surveyed the Empire leases in East Texas.

I surveyed the L. J. Rogers lease. The survey was made on the 27th and 28th of April, 1931. Ben Ramsey was note keeper in the party and acted as Chief of the party. Mr. Hoffsess was instrument man and Mr. Blackman was chainman. They are not in Texas now but are in Kansas.

150 When we made the survey, we had a description of the tract contained in the lease marked Exhibit No. 15.

I do not have the deed to Woods of the 2 acres that is excepted out of the lease when we started the survey. I had it after we started the survey. I went to Longview and searched the records, found a description of the tract out of the Northwest corner of the original tract.

Counsel for Complainant:

We offer in evidence EXHIBIT No. 17.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Deed.

L. J. Rogers, et al., to R. M. Wood.

Dated: May ..... 1917.

Filed: May 15, 1917.

Recorded in Vol. 32, page 582, Deed Records, Gregg County, Texas.

The State of Texas,
County of Gregg.
Know All Men by these Presents:

That we, Mrs. L. J. Rogers, wife of J. T. Rogers. dec'd, J. E. Rogers, son of J. T. Rogers, deceased, and Elvie Waskom, (nee Rogers) daughter of J. T. Rogers, dec'd, joined by her husband, Azzie Waskom, all the heirs at law of J. F. Rogers deceaed, of the County of Gregg, State of Texas, for and in consideration of the sum of fifty ($50.00) Dollars, to us in hand paid by R. M. Wood, as follows:

Fifty ($50.00) Dollars, cash in hand paid, the receipt of which is hereby acknowledged and confessed, have granted, sold and conveyed, and by these presents do grant, sell and convey, unto the said R. M. Wood, of the County of Gregg, State of Texas, all that certain tract or parcel of land situated in the County of Gregg, State of Texas, to-wit:

Being a part of the G. A. Thompson Survey, beginning at the N. W. corner of a twenty-five acre tract of land, conveyed by E. L. Walker, M. D., and Nannie E. Walker to J. W. Mings, by deed dated November 25th,
151 1910, and recorded in Vol. X, page 278, and 279, of the Deed Records of Gregg County, Texas; said beginning corner being 487 vrs. West of the N. E. corner of the G. A. Thompson Survey;

Thence East 118 feet and 3 inches, witness P. O. tree, 24 inches in diameter, bears N. about 80° W. 27 feet;

Thence S. 828 feet to the N. boundary line of W. H. Conn, 50 acre tract;

Thence W. 118 feet and 3 inches to the original SW. corner of the J. W. Mings, 25 acre tract;

Thence N. 828 feet to the place of beginning, containing in all 2 acres of land, more or less.

This being the same tract of land, conveyed to us by J. W. Mings and wife, Addie Mings, by deed dated May 7th, 1917, recorded in Vol. 32, on page 572-3, Deed Records, of Gregg County, Texas.

To which reference is hereby made for a more detailed description of the land herein conveyed.

To have and to hold the above described premises together with all and singular the rights and appurtenances thereto in anywise belonging unto the said R. M. Wood, his heirs and assigns forever; and we do hereby bind ourselves, our executors and administrators to warrant and forever defend, all and singular the said premises unto the said R. M. Wood, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

Witness our hands at Gladewater, Texas, this .... day of May, A. D. 1917.

MRS. L. J. ROGERS,
J. E. ROGERS,
AZZIE WASKOM,
ELVIE WASKOM."

(Acknowledgments.)

(Direct Examination Resumed.)

By Counsel for Complainant:

"When we made the survey, Mr. Rogers was with us."

Counsel for Defendants:

"Will you note that you would not carry that as binding against anybody, except the Mr. Rogers who made the statement?

Counsel for Complainant:

I don't mind the objection, but I take issue with that.

152 Counsel for Defendants:

"Well, note the exception. I don't see how it could be binding on anybody except the party who made it.

The Court:

"I don't think it would be. Go ahead."

(Direct Examination Resumed.)

By Counsel for Complainant:

"Under the circumstances, as indicating the public claim there by a person whose deed called to be there by the field notes themselves. Was he one of the lessors?

A. Yes, he lives on the place; and his name is Rogers.

Q. All right."

(Direct Examination Resumed.)

By Counsel for Complainant:

"He took us to approximately the Southwest corner of the lease and showed us an iron post with a cone shaped cogwheel on it, which is what I referred to as

the gear wheel. He said his corner was 4 rods West or 66 feet. We set a corner 66 feet from the gear wheel. We put an inch and a half pipe there and marked some trees. The trees were within seven feet of the pipe. There was no road where we set the pipe. There had been an old road West of it, I will say 12 feet; and at the time we were there the travel was going between the pipe we set and the cone shaped cogwheel. The ruts were washed terrible West of where we set the pipe. There was a fence to the West of the road. I will judge the fence was about fifteen or twenty feet West of where we set the pipe.

We started our work from that point and in making a survey we ran a traverse around the lines and closed the traverse. We actually started our traverse on
153 that cog wheel there. We showed on the map our actual survey lines. The little triangles shown on the map represents angle points in our traverse. There are probably more instrument points than the triangles but those little triangular points are angles in our traverse line. We ran East along the South line of the lease. There were improvements along there, being a fence at that time. We ran North of the fence.

By the Court:

"Q. How far West did that fence go, between "C" and "A"?

A. The corner is at "C"; and at "A" I show, Judge, that was within 3 feet of that cog wheel at that time.

By the Court:

Q. Was that where the fence extended?

A. Yes.

By the Court:

Q. Did it not extend any further West than that?

A. No."

(Direct Examination Resumed.)

By Counsel for Complainant:

"At "C" I reached a fence corner. From there we followed in a general direction the fence a little East by North. The fence is shown on the map by a black line with crosses. The lease called for 310 yards and that would be 930 feet. The line we ran is 10 feet longer. The direction is about the same. Mr. Rogers said they had always assumed that the fence corner at point "C" was their corner. The fence corner was about an 18 inch square fence pole. The fence was not new but it was a good fence and in good repair. It had been kept in good shape.

154 When we came to point "E", Mr. Rogers pointed out to us an iron pipe. He said they did not know whether the fences running North from the highway and running East were on the line or not and they did not claim it to be. It was in bad condition over close to "E" and ran off into the woods and did not run to the corner. There was a one-half inch iron pipe at "E".

We then determined point "D" by running a line West from point "E" on the bearing and the called distance. There was nothing at point "D" other than as the map shows. The line from "D" to "E" as I have shown it is about 13 feet South of the fence. The fence from "D" running East was not in good condition. The wires were on the post. From "E" running East there was a fence but I did not survey out that fence. There was a fence corner there. The pipe is shown on the map at point "E" and about five feet from the corner. It is within a foot I believe of the East and West fence.

From "E" we ran North approximately along this fence up to point "F". I do not believe we passed any fence corners in running this line. There might have been an old fence coming in there. The dotted line that I have indicated West from "E" to "F" is our traverse line and is not a fence line. The heavy broken line is the fence

line and the solid line is our property line. We indicate a fence by putting an "X" in the broken line.

The fence continued on up to the Northeast corner. At that corner it intersected a lane fence running East and West. There was a line North but I would not call it a road. It had a well defined rut in it but no
155 regular road there. There was a fence on both sides of the lane.

We found an iron bolt with the head up and we took that to be the corner. I do not recall whether Mr. Rogers pointed that out or not. I was not there all the time. I was there the greater part of the time but not all the time.

We drove a two inch iron pipe around the iron bolt. The iron bolt was five feet West and eighteen feet North of that fence corner. There was a fence running to the East also and a fence to the West. It was an old fence.

From point "F" we ran along the lane. The fence continued on West. When we got to point "G" we stopped. I had found the field notes for this 2 acre tract out of the Northwest corner, which called for a witness tree on the northwest corner of the 2 acre tract. I ran and established that corner as being the West line. I do not recall whether the tree was marked. I believe it was but won't say for sure. I believe it was a post oak about fourteen or sixteen inches in diameter. The notes show 16 inches.

That tree is in the lane and there is a fence corner to the South of it in that South lane fence. From there we chained to the South and a little bit West approximately along that fence. We went South along that fence line. It varies one degree 29 minutes to the West of South. It was an old fence. The fence formed approximately a straight line as indicated on the map. The fences were tied into our traverse points and all along the traverse line. There was a residence at the South end of the 2 acre tract. I do not remember
156 whether I saw Mr. Rogers there. I do not recall seeing Mr. Rogers at the Northeast corner at point "G" but he might have been there. As I recall,

the fence ran down to point "H" and stopped. The length of that line is 751.54 feet. The call is for 757 feet. From there I went West to point "I". At point "H" we set the corner in an old fence corner. I won't say for sure whether we found a point there or whether we set our point in an old fence corner; but there is an old fence corner there. I believe the old fence stops there.

We ran West to point "I". The call there is 115 feet to the East side of the Union Grove Public Road with a black jack tree bearing North 10 degrees East 75 feet. We found a very large tree there but I would not say it was marked. I do not believe it was. It was scratched. It was right in the old fence line of the road. We made our corner at the called distance from that witness tree. We established our corner at the bearing from that tree. The corner was in about the East rut of the traveled part of the road. The road at that time was graded and ditched but that was about all. It appeared to be an old grading and ditching.

There was a fence on the East side of the road. There was no fence in front of the house and up about where the tree stood there was a fence running North. The fence was about where the map shows the line platted in but we did not tie to the fence so I could not be accurate about where the fence was located. Generally, though, the fence was along the East edge of the road. There was a fence going from point "G", West on the South side of the land but I did not tie to that fence. That tract of land was excepted from the lease.

157 From the corner I established at "I", we ran down to the Gladewater road in the approximate center of the road running South. At point "I" the road was about forty-three feet wide. It generally followed that width up and down. We ran down approximately the middle of the road. There was a fence on the East as we ran down the road. The fence was about five or six feet from the ditch of the road. It was right along the edge of the road. The fence would vary from eighteen to twenty-five feet from the line down the middle of the

road. The fences were not straight but they meandered down there. They are indicated on the map as we tied into them.

When the fence hit the Gladewater Highway it turned East along the North side of the highway. We tied the fence to our line where it went East along the North side of the highway as shown on the map and found it twenty-five feet East of our line and also another fence eighteen feet West of our line. There is a fence on South of the Gladewater Highway as shown on the map. The fence was 22 feet East of our line and the course of the fence is shown on the map. The farthest distance of the fence running East from our traverse line was 45 feet. At that point the fence on the West was 12 feet from the traverse line. As we went on down the road the map shows the location of the fence. The road swung in to get away from the washed place at "B". As I recall, there were some deep ruts just East of the point "B" and some ruts just West of the point "A". From point "A" the fence runs to the West, going South because the road circles back West.

158 Cross Examination.

By Counsel for Defendants:

Q. "And show "I" to be as a straight South line?

A. Yes.

Q. Your call is South 1 degree 3 minutes East, isn't it?

A. Yes.

Q. If your call is South 1 degree 3 minutes East, even in the ratification, in a half mile, that will make 45 feet difference, and a little over, won't it?

A. Yes.

Q. One degree, three minutes, is a little over 45 feet?

A. Yes.

Q. You show a straight line between "I" and "B"?

A. Yes.

Q. If you would follow the call of your own ratification that you prepared, there would be down here ap-

proximately 45 feet difference down here between the South line, "B" wouldn't there?

Mr. Trammell:
There is no evidence that he signed it.

Mr. Wynne:
Well, that your company got signed. If you are correct in the line "I", and come South 1 degree 3 minutes East, you would be approximately 45 feet, or 40 feet East of "B", wouldn't you?

A. This property line is South 1 degree 3 minutes East.

Q. You show on your map a straight South line?

A. Yes.

The Court:
He said that if he ran 1 degree 3 minutes East from "I" point, that he would be approximately 45 feet
159 East of "B". He asked you if you had run a line from "I" in the general direction of "B"; and you said you established a straight line between those points?

A. Yes.

The Court:
He said if you had run on a course of 1 degree 3 minutes East of "I", instead of the straight South course that you ran, if that would not carry you to a point approximately 40 or 45 feet East of your point "B".

A. If we ran 1 degree East of the line we have here, it would throw us about 45 feet there.

The Court:
All right.

Mr. Wynne:
Also, take "I" up here. The call for the two acre deed is to stop in the East side of the road, isn't it?

A. That is what Mr. Trammell read for the call.

Q. It called to stop at the East side of the road; but you ran 22 feet into the center of the road; didn't you?

A. I established the point "I" the called distance from the bearing object.

Q. The call says "about." Read the call about the bearing tree, and see if it doesn't say "about."

Mr. Trammell:

That refers to the road, as it was then.

Mr. Wynne:

The call is: "Thence West 115 feet to the East side of the Union Grove Public Road;" isn't it?

A. That is the call.

Q. "Witness a black jack bears about 10 deg.
160 E. 75 feet?"

A. That is right.

Q. Now, of course you took the tree, and ran it absolutely 10 deg. 75 feet, didn't you? and that is your corner 22 feet from the fence line?

A. Yes.

Q. If you had moved over to the East side of the road, if the road had not been changed—so far as you know, it had not been changed, had it, since 1878?

A. There was no evidence that it had been changed.

Q. If you put your corner back over to the East side of the road instead of 22 feet from the East side of the road, and came on South, it would make a difference there of several feet, wouldn't it, if you came South 1 degree East?

A. It would have, yes.

I found the call from "C" to "D" approximately correct. I also found the call from "D" to "E" and "E" to "F" approximately correct. I ran 1228 feet on the call from "F" to "G". The map makes the line 409 and a fraction yards over to "G". The call in the partition deed is 440 yards. 409 yards plus 147 feet called in the

Mings deed makes a total of 1375 feet or 458 yards. There is a difference of 55 feet between the called distance of 440 yards and the distance of 1228 feet plus 147 feet.

When we came to the gear wheel, Mr. Rogers did not tell me that it was the point the surveyor had set as the corner of the land partitioned in the Rogers estate. He did not say anything about the surveyor having done that. I was there when Mr. Rogers was talking to Mr. Ramsey.

161 By the Court:

"Q. Did he say anything about that having been there since shortly after the partition was made?

A. I do not recall that he mentioned the partition at all, your Honor."

Re-Direct Examination.

By Counsel for Complainant:

"He said that his uncle set that cog wheel there. I do not recall that he said when. He said the cog wheel was 4 rods East of their corner."

H. J. PATTERSON, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

"My name is H. J. Patterson and I live in Bartlesville, Oklahoma, and am in the employ of the Empire Company as a lawyer. I have been with the company about fifteen years.

I am familiar with the Empire L. J. or F. E. Rogers lease. I know Ben Cox who is located in Tyler, Texas, and is a land man for the Empire Company.

I was present when the oil and gas lease marked Exhibit No. 18 was executed. I went in company with Ben Cox out to this Rogers tract. As I recall, we were scuffling in regard to a surface lease out there and about the time

we got ready to return back to Tyler, Mr. Cox took this lease out. At that time there was present J. E. Rogers and Mr. Cox was speaking to Mr. Rogers. There was nobody else present at that time. J. E. Rogers is sometimes known as Dink Rogers. I was sitting in
162 the car when we first went out to get the corrected lease executed. I had been talking about a surface lease. The Empire Camp is on the Rogers lease. Mr. Cox had the lease with him and told Mr. Rogers that the engineers had completed the survey of the tract of land and they found out that they had not definitely carved out a 2 acre tract up in the Northwest corner. As I recall Mr. Cox said there was another call of 700 and some odds yards on the East, in which there was some error in the description. That was from "D" to "E". Mr. Rogers told him that he would not execute the corrected lease until he had consulted with "Uncle Oscar." Mr. Cox went to Gladewater and got the Uncle and I stayed there.

We did not have the original lease or a copy of it nor did Mr. Cox. His Uncle came out there and read the corrected lease over and then there was a question as to whether or not the original lease had the intention clause in it. I will read the intention clause:

'It being the intention of lessors herein to lease all land owned by them in said survey.'

J. E. Rogers made some question about that and his uncle said they thought they had some excess over there. He said 'We really think what you boys are after is to get some excess.' I told them I thought we had any excess that he had out there under the intention clause, and he said he did not think that was the original lease. I said if it was not we would cut it out of the correction lease and asked him to get me his abstracts. Due to the fact that J. E. Rogers did not have the abstracts
163 nor did Ben Cox, J. E. Rogers and Ben Cox drove to Longview and procured the abstracts. They

came back with the abstracts and the abstracts had the original lease. They were the J. E. Rogers abstracts, as I understand them. Rogers had loaned them to somebody over at Longview for examination for royalty conveyances. Upon seeing that the same intention clause was in the corrected lease that was in the original lease, they then concluded that they just as well go on and sign it. You have handed me Exhibit No. 15 and I find the intention clause in there which reads: 'It being the intention to include all land owned or claimed by lessors in said survey.' The lease was executed and we came back to Tyler. The day was very well consumed. It was acknowledged on the porch on the East side of the house."

Counsel for Complainant:
We offer in evidence EXHIBIT No. 18.

The Court:
The exhibit is admitted in evidence and is in words and figures as follows:

"Oil and Gas Lease (Correction).

Mrs. L. J. Rogers, Elvie Waskom, Azzie Waskom to Empire Gas & Fuel Company.

Dated: May 8th, 1931.

Filed: May 9th, 1931.

Recorded: Vol. 84, page 516. Deed Records, Gregg County, Texas. File No. 14690.

Agreement, made and entered into the 20th day of October, 1930, by and between L. J. Rogers, a widow, Elvie Waskom and husband, Azzie Waskom; J. E. Rogers and wife, Ola May Rogers, of Gregg County, Texas, here-

inafter called lessor (whether one or more) and
164 Empire Gas & Fuel Company, hereinafter called lessee;

Witnesseth: That the said lessor, for and in consideration of Ten ($10.00) Dollars, cash in hand paid, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of lessee to be paid, kept and performed, ha— granted, demised, leased and let, and by these presents do grant, lease and let unto the said lessee for the sole and only purpose of mining and operating for oil and gas and of laying pipe lines and of building tanks, power stations and structures thereon to produce, save and take care of said products, all that certain tract of land situated in the County of Gregg, County, State of Texas, described as follows, to-wit:

Being a part of the G. A. Thomas Headright starting at the N. E. corner of Lot No. 2, which is the N. W. corner of the W. H. Rogers tract No. 1;

Thence N. 89 deg. 44′ W. a distance of 1228.19 ft.;

Thence S. 0 deg. 56 W. a distance of 726.32 ft.;

Thence S. 80 deg. 59′ W. a distance of 118.34 ft.;

Thence S. 1 deg. 03′ E. a distance of 1919.14 ft.;

Thence N. 89 Deg. 30′ E. a distance of 738.89 ft.;

Thence N. 10 deg. 36′ E. a distance of 940.45 ft.;

Thence N. 88 deg. 31′ E. a distance of 462.24 ft.;

Thence N. 1 deg. 29′ W. a distance of 1715.64 ft. to the point of beginning, said tract to contain 66-1/5 acres, more or less. It being the intention of the lessor herein to lease

all land owned by them in said survey and containing 66-1/5 acres, more or less.

It is agreed that this lease shall remain in force for a term of ten years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee.

In consideration of the premises the said lessee covenants and agrees:

1st. To deliver to the credit of lessor, free of cost, in the pipe line to which they may connect their wells the equal one-eighth part of all oil produced and saved from the leased premises.

2nd. To pay to lessor as royalty for gas from each well where gas only is found, while the same is being sold or used off of the premises, one-eighth of the market price at the wells of the amount so sold or used, the lessor to have gas free of charge from any gas well on the leased premises for all stoves and inside lights in the principal dwelling house on said land during the time by making lessor's own connections with the well at lessor's own risk and expense.

3rd. To pay to lessor as royalty for gas produced from any oil well and used by lessee for the manufacture of gasoline one-eighth of the market value of such
165 gas. If such gas is sold by lessee, then lessee agrees to pay lessor, as royalty, one-eighth of the net proceeds derived from the sale of said casinghead gas at the wells.

If no well be commenced on said land on or before the 20th day of October, 1931, this lease shall terminate as to both parties, unless the lessee on or before that date shall pay or tender to the lessor, or to the lessor's credit in the Everett Banking Co. Bank at Gladewater, Texas, or

its successors, which shall continue as the depository regardless of changes in the ownership of said land, the sum of $66,20/100 Dollars, which shall operate as rental and cover the privilege of deferring the commencement of a well for 12 months from said date. In like manner and upon like payments or tenders the commencement of a well may be further deferred for like periods of the same number of months successively. And it is understood and agreed that the consideration first recited herein, the down payment, covers not only the privilege granted to the date when said first rental is payable as aforesaid, but also the lessee's option of extending that period as aforesaid, and any and all other rights conferred.

Should the first well drilled on the above described land be a dry hole, then and in that event, if a second well is not commenced on said land within twelve months thereafter, this lease shall terminate as to both parties, unless the lessee on or before the expiration of said twelve months shall resume the payment of rentals in the same amount and in the same manner as hereinbefore provided. And it is agreed that, upon the resumption of the payment of rentals as before provided, that the last preceding paragraph hereof, shall continue in force just as though there had been no interruption in the rental payments.

If, at the expiration of 10 years from the date of this lease, oil or gas is not being produced on the leased premises, but lessee is then engaged in drilling for oil or gas, then this lease shall continue in force so long as drilling operations are being continuously prosecuted on the leased premises; and drilling operations shall be considered to be continuously prosecuted if not more than sixty (60) days shall elapse between the completion or abandonment of one well and the beginning of operations for the drilling of a subsequent well. If oil or gas shall be discovered and produced in paying quantities from any such well or wells drilled or being drilled at or after

the lapse of 10 years this lease shall continue in force so long as oil or gas shall be produced from the leased premises.

It is specially agreed that in the event that oil or gas is produced from said premises and said production shall for any reason cease or terminate, lessee shall have the right at any time within ninety (90) days from
166 the cessation of such production to resume drilling operations in the effort to make said leased premises again produce oil or gas, in which event this lease shall remain in force so long as such operations are continuously prosecuted as defined in the preceding paragraph, and if they result in production of oil or gas, so long thereafter as oil or gas is produced in paying quantities from the premises.

If said lessor owns a less interest in the above described land than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided for shall be paid the said lessor only in proportion which lessor's interest bears to the whole and undivided fee.

Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for all operations thereon, except from water wells of lessor. When requested by lessor, lessee shall bury pipe line below plow depth. No well shall be drilled nearer than 200 feet to the house or barn now on said premises without the written consent of the lessor. Lessee shall pay for damages caused by all operations to growing crops on said land. Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

If the estate of either party hereto is assigned—and the privilege of assigning in whole or in part is expressly allowed—the covenants hereof shall extend to their heirs. executors, administrators, successors or assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on the lessee until

after the lessee has been furnished with a written transfer or assignment or a certified copy thereof; and it is hereby agreed that in the event this lease shall be assigned as to a part or as to parts of the above described lands and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due from him or them, such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands upon which the said lessee or any assignees thereof shall make due payment of said rental.

Lessee shall have the exclusive right to build, operate and maintain pits, reservoirs, pickup stations and plants for the purpose of picking up and conserving the waste oil that flows down the creeks, ravines and across the land embraced in this lease, whether said oil is produced from lands, covered by this lease or other lands, and lessor shall be entitled to receive the royalty hereinbefore reserved on all such oil so saved.

In case of cancellation or termination of this lease for any cause, lessee shall have the right to retain under the terms hereof twenty (20) acres of land around each oil or gas well producing, being worked on, or drilling hereunder (as long as such operations are continued in good faith) such tract to be designated by lessee in as near a square form as practicable.

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In the event lessor considers that lessee has not complied with all its obligations hereunder, both express and implied before, production has been secured, or after production has been secured, lessor shall notify lessee in writing, setting out specifically in what respects lessee has breached this contract. Lessee shall then have sixty days (60) after the receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by lessor. The service of said notice shall be precedent to the bringing of any action by lessor, on said lease for any cause and no such action shall be brought until the lapse of sixty (60) days after service

of such notice on lessee. Neither the service of said notice nor the doing of any acts by lessee aimed to meet all or any of the alleged breaches shall be deemed an admission or presumption that lessee has failed to perform all its obligation hereunder.

Title to the minerals vested in grantee under this grant shall not end or revert to grantor until there is a complete, absolute and intentional abandonment by grantee of each and all of the purposes, expressed or implied, of this grant and every part and parcel of the premises described in this grant.

Lessor hereby warrants and agrees to defend the title to the lands herein described and agrees that the lessee shall have the right at any time to redeem for lessor by payment, any mortgages, taxes, or other liens on the above described lands, in the event of default of payment by lessor and be subrogated to the rights of the holder thereof.

This lease being executed for the purpose of correcting description in that certain lease made by the parties hereto 10/20/30 recorded Volume 61, page 295 County Clerk Records, Gregg County, Texas, and to be lieu of said lease.

In testimony whereof we sign this 8th day of May, 1931

her
MRS. L. J. ROGERS, X
mark

ELVIE WASKOM,
AZZIE WASKOM,
J. E. ROGERS,
OLA MAE ROGERS.

Witness to mark:
H. J. PATTERSON,
H. BEN COX."

(Acknowledgments.)

168 BEN COX, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

"My name is H. Ben Cox and I live in Bartlesville, Oklahoma, and am Assistant Superintendent for the Land Department of the Empire Gas & Fuel Company. I have been there two years and before that time I was in Texas and occupied the position of District Land Man in Tyler and Houston. I was in Tyler about three years and Houston about one. I was living in East Texas in 1931. In my capacity as District Land Man I had something to do with the Empire L. J. or F. E. Rogers lease. You have handed me Exhibit No. 18, being the corected lease from L. J. Rogers and others to the Empire. The original lease was to Chandler.

The company advised me that the description in the original lease was in error, and also excepted a two acre tract; that the two acre tract was not excepted by metes and bounds description and that our surveyor had surveyed the tract, which left out the two acres. That we had to secure a ratification lease, or a new lease with a description as worked out by our surveyors. I think Mr. Patterson came down from Bartlesville about that time to do corrective work on the various leases and as I recall this lease had been prepared and was brought down by him. We went out to the Rogers land.

At that time I was also negotiating for surface lease for a camp site. We talked about the surface lease and brought up the question of securing a corrected lease.

169 At that time we were talking with Dink Rogers. We were out in the yard. We went in the house later on. His mother was in there, his wife and

his sister, Mrs. Watson and, I believe, her husband. During the discussion concerning securing the lease, Dink said he would not have anything to do with it until he had talked to his Uncle Oscar, who lived in Gladewater. His uncle's initials were F. H. or F. E. and I have met him. He has been in the Court room. There he is and it is F. E. Rogers. I told Dink I would go to Gladewater and get his uncle and bring him out there and discuss the matter. That was agreeable with him. I went to Gladewater and brought the uncle out there and explained to him what we wanted. There was present then Dink, Uncle Oscar, Mr. Patterson and myself. By Dink I mean J. E. Rogers. We were standing in the yard and some of the women folks were on the porch in hearing distance. We were out there the better part of the day. In discussing the lease and reasons for getting it and one thing or another, they thought we were probably trying to include some excess acreage. They said "We think what you want it for is you are trying to get some excess acreage." I said: "I do not understand it that way. This lease calls for the same amount of acreage as the original lease called for. If there is any excess in there it would be covered by your intention clause anyway in my opinion." I meant by the intention clause the clause that is in the original lease which you have handed me. Uncle Oscar said he did not think that clause was in the original lease and, as we did not have the original lease with us, in order to convince him that it was, we had to go to Longview and get some abstracts that belonged to J. E. Rogers. They were in some lawyer's office in Longview. J. E. Rogers went with me.

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We got the abstracts and drove back to the home place. Mr. Patterson remained at the Rogers house. After we got back we read the original lease in the abstract to them and showed that the same clause was in the original lease and they were satisfied. The new lease had practically the same intention clause. Then I took a Notary

Public from Gladewater and we had all of them sign the lease and took the acknowledgments and went home. I made no representations to them other than as I have stated."

Cross Examination.

By Counsel for Defendants:

"I told J. E. Rogers and F. E. Rogers that the correction lease called for the same amount of acreage as the original lease.

Q. You did tell J. E. Rogers and F. E. Rogers that this lease contained the same amount of acreage as the other lease did?

A. That it called for the same amount.

Q. And that there was no additional land included in it, other than the first lease?

A. Well, no, the intention clause—

Q. Didn't you just testify that a minute ago?

A. Yes, that's right.

Q. And also told him that the change had been made from yards to feet, but there was no additional land?

A. I don't recall saying anything about the change from yards to feet.

171 Q. But it was changed from yards to feet?

A. Yes."

Re-Direct Examination.

By Counsel for Complainant:

"There was a discussion about the intention clause and I told him if he had any excess land it was included in the original lease in my opinion by reason of the intention clause. Mr. Patterson was there and we were both arguing with them."

Stipulation.

"It is stipulated that John Akin would testify that he bought this two acres on whatever date the deed shows, and that it was fenced at that time, and that the fence has been kept up since that time by him until he sold it to Mr. Clark, and that no claim as far as he knows has ever been made to any part of that two acre tract since he has owned it, or been concerned with it, by any of the Rogers."

Counsel for Defendants:

"We don't claim any part of that two acres, as fenced at this time.

Counsel for Complainant:

I am so stipulating as to Mr. Pegues.

The Court:

Let the record show that it is agreed that the respondents do not claim any part of the two acres just referred to as fenced."

Counsel for Complainant:

We offer in evidence EXHIBIT No. 19.

172 The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Ass'gn Oil & Gas Lease.

"W. P. Chandler to Empire Gas and Fuel Co.

Dated Oct. 21, 1930.

Filed Nov. 18, 1930.

Recorded Vol. 61, page 294, Deed Records Gregg County, Texas.

Whereas, on the 20th day of October, 1930, a certain oil and gas mining lease was made and entered into by and between L. J. Rogers (a widow), J. E. Rogers, A. S. Waskon and wife, Elvie Waskom, Lessors, and W. P. Chandler, lessee, covering the following described land in the County of Gregg and State of Texas, to-wit: being a part of the G. A. Thomas Headright, starting at the N. E. corner of Lot No. 2, which is the N. W. corner of W. H. Rogers tract Lot No. 1 running West 440 yards to Wiley Davis N. E. corner;

Thence South 880 yards;

Thence East 224 yards;

Thence North 310 yards at 12 deg. East of North;

Thence East 754 yards to W. H. Roger's line;

Thence North 572 yards to starting point, containing 68 1/5 acres, more or less, and being the same land described in a deed from J. W. Rogers, W. H. Rogers and F. E. Rogers to J. F. Rogers February 28th, 1899, and recorded in Vol. R, pages 59-60, Deed Records Gregg County, Texas, save and except two (2) acres out of the N. W. corner sold to R. M. Wood.

Said lease being recorded in the office of the County Clerk in and for said County in Book ...., page ....., and;

Whereas, the said lease and all rights thereunder or incident thereto are now owned by W. P. Chandler.

Now, therefore, for and in consideration of one dollar (and other good and valuable considerations), the receipt of which is hereby acknowledged, the undersigned the presents owner of the said lease and all rights thereunder

or incident thereto, does hereby bargain, sell, transfer, assign, and convey all rights, title and interest of the original lessee and present owner in and to said lease and rights thereunder, in so far as it covers the above described tract, together with all personal property used or obtained in connection therewith to Empire Gas and Fuel Company and their successors and assigns.

And for the same considerations, the under-
173 signed for himself and his heirs, successors and representatives, does covenant with the said assignee their successors or assigns, that W. P. Chandler the lawful owner of the said lease and rights and interest thereunder and of the personal property thereon or used in connection therewith; that the undersigned has good right and authority to sell and convey the same, and that said rights, interest and property are free and clear from all liens and incumbrances, and that all rentals and royalties due and payable thereunder have been duly paid.

In witness whereof, the undersigned owner and assignor has signed and sealed this instrument this 21st day of October, 1930.

W. P. CHANDLER."

(Acknowledgment.)

Counsel for Complainant:

We offer in evidence EXHIBIT No. 20.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

"Mineral Deed.

"L. J. Rogers, et al., to Curtis M. Willock.

Dated May 4, 1931.

Filed May 4, 1931.

Rec. Vol. ....., page ....., Deed Records of Gregg County, Texas.

File No. 14121.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That we, L. J. Rogers, widow, Elvie Waskom and husband, Azzie Waskom, J. E. Rogers and wife, Ola May Rogers, of Gregg County, Texas, for and in consideration of the sum of Ten & no/100 Dollars ($10.00) cash in hand paid by Curtis M. Willock, hereinafter called Grantee, the receipt of which is hereby acknowledged.

Have granted, sold, conveyed, assigned and delivered and by these presents do grant, sell, convey, assign and deliver unto the said grantee an undivided one-fourth interest in and to all of the oil, gas and other minerals in and under and that may be produced from the
174 following described land situated in Gregg County, Texas, to-wit:

Being a part of the G. A. Thomason H. R. starting at the N. E. Corner of Lot No. 2, which is the N. W. corner of W. H. Rogers tract Lot No. 1 running West 440 yards to Wily Davis N. E. corner;

Thence S. 880 yards;

Thence East 224 yards;

Thence North 310 yards at 12 deg. East of North;

Thence East 754 yards to W. H. Rogers line;

Thence North 572 yards to starting point, containing 68-1/5 acres, more or less, and being the same land described in a deed from J. W. Rogers, W. H. Rogers and F. E. Rogers, to J. F. Rogers, February 28, 1899, Rec. Vol. "R," pages 59-60, Deed Records of Gregg County, Texas, save and except 2 acres out of N. W. corner sold to R. M. Wood.

Together with the right of ingress and egress at all times for the purpose of mining, drilling and exploring said land for oil, gas and other minerals, and removing the same therefrom.

Said land being now under an oil and gas lease executed in favor of Empire Oil Company, it is understood and agreed that this sale is made subject to the terms of said lease, but covers and includes one-fourth of all of the oil, royalty and gas rental or royalty due to be paid under the terms of said lease.

It is understood and agreed that none of the money rentals which may be paid to extend the term within which a well may be begun under the terms of said lease is to be paid to the said grantee and in event that the above described lease for any reason becomes canceled or forfeited, then and in that event an undivided *none* of the lease interest and all future rentals on said land for oil, gas and other mineral privileges shall be owned by said grantee, he owning one-fourth of all oil, gas and other minerals in and under said lands, together with none interests in all future rents.

To have and to hold the above described property, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said grantee herein, his heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said property unto the said grantee herein, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands this the 4th day of May, 1931.

her
L. J. X ROGERS,
mark
J. E. ROGERS,
175 OLA MAY ROGERS,
ELVIE WASKOM,
AZZIE WASKOM.

Witnesses as to mark:
HONOR STOKES,
E. P. BOREN."

(Acknowledgments.)

Counsel for Complainant:
We offer in evidence EXHIBIT No. 21.

The Court:
The exhibit is admitted in evidence and is in words and figures as follows:

"Mineral Deed.

"Elvie L. Waskom to Gossett & Harrington.

Dated: July 28, 1931.

Filed: July 29, 1931.

Recorded: Vol. ..... P. ....., Deed Records, Gregg Co., Texas.

File No. 21827.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, Elvie L. Waskom, joined herein by her husband, A. S. Waskom, of Harris County, Texas, for and in consideration of the sum of ten and no 100 dollars ($10.00) cash in hand paid by H. O. Gossett & H. M. Harrington, hereinafter called grantee, the receipt of which is hereby acknowledged, have granted, sold, conveyed, assigned and delivered and by these presents do grant, sell, convey, assign and deliver unto the said grantee an undivided one thirty second (1 32) interest in and to all of the oil, gas and other minerals in and under and that may be produced from the following described land situated in Gregg County, Texas, to-wit:

Being a part of the G. A. Thomason H. R. survey starting at the N. E. corner of Lot No. Two (2) which is the N. W. corner of the W. H. Rogers tract Lot No. One (1) running West 440 yards to Wily Davis N. E. corner;

Thence South 880 yards;

Thence East 224 yards,

Thence North 12 deg. East 310 yards,

Thence East 154 yards to W. H. Rogers line,

Thence North 572 yards to starting point, containing 68-1 5 acres more or less and being the same land described in deed from J. W. Rogers, W. H. Rogers and F. E. Rogers to J. F. Rogers, February 28th, 1899, Recorded in Vol. "R." pages 59-60, Deed Records of Gregg County, Texas, Save and Except two (2) acres out of N. W. corner sold to R. M. Wood, together

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with the right of ingress and egress at all times for the purpose of mining, drilling and exploring said land for oil, gas and other minerals, and removing the same therefrom, specilly granting to said grantee the right of ingress and egress upon and over said land at all times for the purpose of inspecting any and all oil wells, gas wells, storage tanks and checking the oil runs.

Said land being now under an oil and gas lease executed in favor of W. P. Chadler and now held by Empire Gas and Fuel Company it is understood and agreed that this sale is made subject to the terms of said lease, but covers and includes one thirty-second (1/32) of all of the oil royalty and gas rentals or royalty due to be paid under the terms of said lease, it being the intention to convey one barrel out of every thirty-two barrels of royalty oil accruing under said lease.

It is understood and agreed that one tirty-second of the money rentals which may be paid to extend the term within which a well may be begun under the terms of said lease is to be paid to the said grantee and in event that the above described lease for any reason becomes canceled or forfeited then and in that event an undivided one thirty second of the lease interest and all future rentals on said land for oil, gas and other minerals shall be owned by said grantee they owning one thirty second of all oil, gas and other minerals in and under said lands, together with one thirty second interest in all future rents.

To have and to hold the above described property, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said grantee herein, theirs heirs and assigns forever, and I do hereby bind myself, my heirs, executors and administrators to to warrant and forever defend all and singular the said property unto the said grantee herein, their heirs and

assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands this the 28th day of July, A. D. 1931.

ELVIE L. WASKOM,
A. S. WASKOM."

(Acknowledgment.)

177 Counsel for Complainant:
We offer in evidence EXHIBIT No. 22.

The Court:
The exhibit is admitted in evidence and is in words and figures as follows:

"Mineral Deed.

"H. O. Gossett, et al., to J. B. Parker.

Dated: January 15, 1932.

Filed: January 20, 1932, 8:40 A. M.

Recorded: Vol. 119, page 398, Deed Records, Gregg County, Texas.

File No. 1075.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That we, the undersigned, of Gregg County, Texas, for and in consideration of the sum of Ten and no/100 Dollars ($10.00) cash in hand paid by J. B. Parker, of Jena, Louisiana, hereinafter called grantee, the receipt of which is hereby acknowledged, have granted, sold, conveyed, assigned and delivered and by these presents do grant,

sell, convey, assign and deliver unto the said grantee an undivided one thirty-second interest in and to all of the oil, gas and other minerals in and under and that may be produced from the following described land situated in Gregg County, Texas, to-wit:

All that certain tract or parcel of land situated in Gregg County, Texas, being a part of the G. A. Thomason H. R. Survey, starting at the N. E. corner of Lot No. 2 which is the N. W. Corner of the W. H. Rogers' tract Lot No. 1 running West 440 yards to Wiley Davis N. E. corner;

Thence South 880 yards;

Thence East 224 yards;

Thence North 310 yards at 12° East of North;

Thence East 154 yards to W. H. Rogers line;

Thence North 572 yards to starting point, containing 68-1/5 acres, more or less, and being the same land described in deed from J. W. Rogers, W. H. Rogers and F. E. Rogers to J. F. Rogers, February 28, 1899, recorded in Vol. R, page 59-60, Deed Records of Gregg County, Texas, Save and Except two acres out of the N. W. corner sold to R. M. Wood.

Together with the right of ingress and egress at all times for the purpose of mining, drilling and exploring said land for oil, gas and other minerals, and removing the same therefrom.

178 Said land being now under an oil and gas lease executed in favor of W. P. Chandler now owned by Empire Gas & Fuel Company, it is understood and agreed that this sale is made subject to the terms of said lease, but covers and includes one thirty-second of all of

the oil royalty, and gas rental or royalty due to be paid under the terms of said lease.

It is understood and agreed that one thirty-second of the money rentals which may be paid to extend the term within which a well may be begun under the terms of said lease is to be paid to the said grantee and in event that the above described lease for any reason becomes cancelled or forfeited, then and in that event an undivided one thirty-second of the lease interest and all future rentals on said land for oil, gas and other minerals privileges shall be owned by said grantee he owning 1/32nd of all oil, gas and other minerals in and under said lands, together with 1/32nd interest in all future rents.

To have and to hold the above described property, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said grantee herein, his heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said property unto the said grantee herein, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands this the 15th day of January, 1932.

H. O. GOSSETT,
H. M. HARRINGTON,
A. L. CONNOR, Trustee."

(Acknowledgments.)

G. W. CLARK, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

"My name is G. W. Clark and I live about two miles East of Gladewater and have lived there since February, 1926. I know the location of the Mrs. L. J. Rogers tract.

It lies East of a tract of land owned by me. I have the Wiley Davis tract. He did own it. I have several old deeds from different ones. I bought the tract in
179 February, 1926. Most of my tract of land was fenced in February, 1926. There was an old road along my East line. It did not go clear to the Northwest corner. There was a little place there that the road made a square turn, coming up out of the highway going North and down about a couple hundred yards another square turn. Where it made the first square turn going up North from the main highway, when I bought it there was a little part of the corner of it the fence cut off, and a little extra road there in case of bad weather. I just left that there.

There is a little left out on my Northwest corner. The road, with that extra road there, made a round turn instead of a square turn. When I bought the land I naturally just thought that if that fence run square and had not left out that little part, that the fence was the line and the tract of land probably gave half the road. The original tract was fenced on the East side of the road. The fence came clear on down with the two acre tract from the highway. Coming out of the highway the fence ran North from the highway along the East side of the road and hit the Southwest corner of the 2 acre strip. The two acre strip was fenced to itself. It was fenced when I bought my tract on the West. There was a fence on my East line down there. The fences were from 35 to 40 feet apart. That is my estimation of the distance. I had been along there a good many times. There has been a change in the road with reference to its width. I gave an easement to the County. Most of the road came off my side of it. It has been widened but I do not know how
180 much wider. The fence on the East side of the road was kind of torn up at the time the Sun Company drilled a well there but they fixed it back. The fence is approximately where it was at the time I owned the 2 acre tract, with the exception of possibly right up

next to the house that I have on the two acres. There might be a little right there in front of the house that is torn down. The fence that ran from the Southwest corner of the 2 acre tract on down the highway has been torn down. It has been torn down since the oil boom in 1931. Up to that time it was a fair fence. I bought the two acre tract East of the road about six or seven years ago. I bought it after John Akin had leased it. I never heard of any claim to any strip of land along the West side of that two acre tract by any of the Rogers. I never heard of any claim to the two acre tract adverse to my claim until this case. I understand that the land East of the 2 acre tract and South belonged to Mrs. Rogers and her children. I never had the sixty acres that I bought surveyed.

Cross Examination.

By Counsel for Defendants;

I said I did not hear that any of the Rogers were claiming any part of the 2 acres as fenced up until the time of this suit. I believe Mr. Cowing told me the Rogers were claiming the land.

Q. You just heard me stipulate that we did not claim any part of the 2 acres.

A. I do not mean the 2 acres. I thought he meant the part that is in litigation. I misunderstood him. If my deed calls to read to the East side of the road,
181 I did not know it. I did not have either tract surveyed. At the time I went there the fence made a continuous North and South line that was along the East line of my 60 acre tract and the East line of the Sheppard tract, which is now the Haynes tract. The Haynes fence and my fence made a continuous North and South line before I gave this extra land for the road after the oil field came in. None of my land crosses the Gladewater road. When I moved back my East line fence West

to give some more road the oil field had come in. They wanted to widen and make a paved road there and I gave some extra land but up until that time the Haynes fence running North and South and my East fence running North and South was almost a continuous North and South line.

There was an old road that ran from the highway up close to what I call the old school house tract. The road swung to the West a little and cut off a little of my land up there. I did not fence it. The road swung to the left across what I thought was the Northeast corner of my tract. It swung across the school house lot. My fence, up until about the time I gave the extra road or soon thereafter, made a continuous line until it hit the school house tract and then it swung to the left."

Counsel for Complainant:

We offer in evidence EXHIBIT No. 23.

The Court:

The exhibit is admitted in evidence and is in words and figures as follows:

182 "Deed.

"S. F. Jordan, et ux, to G. W. Clark.

Dated: February 11, 1926.

Filed: February 27, 1926.

Rec. Vol. 51, page 632, Deed Records, Gregg County, Texas,

The State of Texas,
County of Gregg.

Know All Men By These Presents: That we, S. F. Jordan and wife, Moddest Jordan, of the County of Gregg,

State of Texas, for and in consideration of the sum of sixteen hundred and fifty ($1650.00) dollars to us paid by G. W. Clark as follows:

Cash in hand paid the receipt whereof is hereby acknowledged, have granted, sold and conveyed and by these presents do grant, sell and convey unto the said G. W. Clark, of the County of Gregg, State of Texas, all that certain tract, lot or parcel of land situated about 2½ miles East from the town of Gladewater on the Jefferson Highway in Gregg County, Texas, and more particularly described as follows:

Beginning on N. B. line of G. A. Thompson survey 950 vrs. W. of its N. E. corner at NW. corner of J. G. Peques land,

Thence W. 1990 feet with N. line of Thompson Survey to E. W. Clements N. E. corner;

Thence South 730 feet to Jefferson Highway and on 1392 feet to N. B. line of J. M. Haynes 202 acre tract and S. E. corner of E. W. Clements land;

Thence E. 750 feet stake for corner on Haynes line;

Thence N. 425 feet to Jefferson Highway.

Thence in an easterly direction with Highway about 1390 feet to J. L. Rogers W line;

Thence North 1365 feet to beginning, containing 60 acres, more or less

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said J. W. Clark, his heirs and assigns forever. And we do hereby bind

ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said G. W. Clark, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands at this 11th day of February, A. D. 1926.

S. F. JORDAN,
MODDEST JORDAN.

$2.00 Revenue Stamps *avoided.*"

(Acknowledgments.)

183 E. W. CLEMENTS, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

My name is E. W. Clements and I live two miles East of Gladewater and have lived in Gregg County since 1884 and lived where I now live for about thirty-six years.

The property I own adjoins the G. W. Clark 60 acre tract on the West. It lies North and West of the J. M. Haynes land and joins said tract.

I know Wiley Davis. He owned the George W. Clark place at one time, which is North and South of the Gladewater road. He owned two tracts.

I know where the Wiley Davis land was located. His Northwest corner joined my land. He was J. W. Davis. I knew that land when the Victorys owned it. The old gentleman was living there when I first came to this country. The tract that I have reference to is the tract North and West of the road and is the second tract in the

deed to J. W. Davis, dated October 17, 1891. The road was then known as the Marshall-Tyler road. My line joined the Southwest corner of the Davis land North of the road. The call in the deed reads: 'Thence North 352 varas a stake on the South boundary of the Edwards Survey, a red oak North 40 degrees West 2,2 vrs.' That would be my Northeast corner and I remember that tree, the red oak and a pine I recollect. The red oak between Davis land and my land was a little Southwest of the corner. The Edwards survey was right North of my land and North of the Thomason Survey.

184 The red oak at my Northeast corner and Davis' Northwest corner was on my side, which had not been cleared. It had an X on it. It was about twelve feet probably Southwest of the fence corner there now, which is my fence corner. The red oak is gone. It has been gone fifteen years. I cleared the land.

The call in the Davis deed reads 'East with said line 446 vrs. a stake a pine bears 7 vrs.' There is a pine at the Northeast corner of the Wiley Davis land now but it is not right at the corner. I see the pine nearly every day. It is on a line between the Davis place and mine. It is marked with three hacks. There used to be an old pine there with a hack on it but Mr. Davis cut that and made palings out of it. That pine was a little nearer the Davis corner than the pine that now stands there.

When I first knew the Davis land there was no road between it and the Rogers land to the East. I remember when the road was put there but I do not remember the year. I worked on the road. Mr. Davis had probably ten or twelve acres fenced right along the road next to the highway but the North end was not fenced. Mr. Davis did not later fence it. It was fenced next to the highway when I cut the road out but the other part was not. I helped cut a part of the road out that runs from the Gladewater Highway to the Northeast corner. All of the road was not cut out at one time. Davis' fence on the East ran to where the road was cut but his fence did not

go clear to the North line. The road was not cut out to the North line.

185 There were several marked trees running along where the road was put. They cut the trees down and tried to put the road about the center of the line where the marked trees were. The road did not run up to the pine at the Northeast corner at that time. The original pine is gone. It had a cross on it. I thought the pine was the corner by being marked with an X on it. We did not cut the road up to that pine. I remember an acre being out for a school up there, which was about thirty years ago. The acre for the school house was not exactly square but it was supposed to be an acre. The road went right up to the Edwards survey and then turned West across part of the school grounds. It ran West of the original pine tree. It left a pine just North of the school house grounds. The pine was sixty or seventy feet from the school house grounds. There is no pine there now. There might be a little sweet gum tree there but no pine. I think William Wright put up the fence North toward the school house and Arch McFarland cleared that out up there nearly to the school house.

When I helped cut the road out it was about sixteen feet wide. The road North from where I stopped cutting to the North line of the survey was about twenty feet wide. The West side of the road was fenced. Part of it was fenced when Mr. Davis lived there and the balance of it was not fenced until Mr. William Wright bought the place. The fence on the East side of the road was built about the same time. It was about twenty four feet between the West fence and the Davis East fence. I do not think the original fence went out to the North

186 corner. It was fenced up to where Mr. Clark bought the tract. It was fenced more than half way to the North line. The two acres bought by Mings was fenced. Mr. Mings fenced part of it. It had been fenced up until the oil well came and tore it down. The fences on the two acres remained there substantially as

they were originally fenced. I never heard of a strip of land being left out East of that road by anybody. I never heard of anybody claiming any of that land in there except J. F. Rogers after it was deeded to him in 1899.

Cross Examination.

By Counsel for Defendants:

I have seen the old gear wheel. It was not there until they subdivided the land. I remember they subdivided the Rogers land into four tracts. The gear wheel has been there a good long while. It had been there a good many years before the oil boom. I am satisfied it was a land corner where the fence went there.

The fence on the South included the land that two of the Rogers got and the fence on the North tied into the point at the gear wheel. That made a common corner for the Rogers two boys' tract on the South and the Rogers tract on the North. That was a common corner up to the oil boom.

Mr. Davis had fenced his tract of land before there was any road ever cut out running to the North. When I cut out the road I cut out all the road that was cut out East of the Davis fence as he had fenced it. Then the road went on up North just as far as Mr. Davis had built his fence and that is where we stopped cutting.
187 Later on, the road was cut out on North and swung to the left and really went across the school house acre. The travel did not go across the school house ground except in bad weather, only right to the corner. I said the road swung across the school house ground and left the pine tree out. That tree was in line with the Davis line and in line with the Haynes line.

I know where the M. O. Sheppard 36 acre tract is but the post oak tree is on the King tract at the Southwest corner. The Northeast corner of the Sheppard tract is at a red oak. I know where the Northeast corner of the Sheppard tract is located as fenced. The fence on the Sheppard tract went on North after the Wiley Davis tract

picked it up on the North and extended on to the school house tract and was a continuous North and South fence. The fence remained there until Mr. Clark removed it since the oil boom to give some new road. Since the oil boom came the road has been widened and is now sixty to eighty feet wide.

I know where it is from the old gear wheel over to the Bozeman or Haynes tract as it was fenced and the distance is about fifty or six feet. The Haynes fence, which was the Bozeman fence, is now about eight or ten feet further West than it used to be. It is on the same course from the tree at the South corner. It was an old rail fence in those days. I know the old rail fence went further East because we tore down the old fence and set it over West. Mr. Haynes put the new wire fence about where the corners were of the old rail fence. I do not know where the B. F. Phillips well is located. I know where the well is located in the road. The old
188 rail fence ran along about where that well is located. Mr. Haynes put the wire fence there about fifteen years ago. So far as I know, Mr. Davis never had his tract surveyed out.

Re-Direct Examination.

By Counsel for Complainant:

I remember where the old Rogers house stood. It stood North of the Gladewater Highway. I do not know whether the old house was on the J. F. Rogers tract or not. There was a fence around the old house. The fence is right about where it now stands."

W. H. YORK, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

"My name is W. H. York and I have lived in Gregg County since 1881. I live at Gladewater.

I know Bozeman that owned part of the Thomason Survey and married his oldest daughter. I knew Mrs. M. O. Sheppard. She was a daughter of Mr. Bozeman and was my wife's half-sister. I knew J. A. Simmons. Mrs. J. A. Simmons was my wife's mother. She was the former wife of Mr. Bozeman and later married J. A. Simmons. I do not remember his initials. He was a surveyor. He sold the M. O. Sheppard 36 acre tract. He and Mrs. Simmons sold M. O. Sheppard the little tract of land.

I helped him in his surveying work. I helped him run out the partition when it was made of the Bozeman estate. That was the West one-half of the Thomason Survey. At that time Alexander Rogers owned
189 the East one-half of the survey. Alexander Rogers was living there. He was away from there though at that time.

In making the survey and dividing up the West one-half in the Bozeman partition, we started on the Southwest corner of the Thomason Survey. I helped run out for Mr. Bozeman before he died timber lines in 1886. He was along with us. We always went to the Southwest corner of the Thomason Survey, which was the Southeast corner of the Rhodes Survey and on the lines of the Rain Survey. The Southwest corner of the Thomason Survey was marked at that time. There was an old thimble there in the edge of an old log road. I had a corral built there. There was a gum for a bearing tree and I had my gate swung to it. That gate is not there now but part of the stump is. It is kind of a rotten old stump there. The gum was marked in two places. It seemed to be a tree that was marked for the two corners. It was marked with an X on the East side with two hacks above and two below. A similar mark was there on the other side bearing for the two corners. There is a house just South of this tree and what I used to know as the Isley land. The house is ten or fifteen years old. There is a road North of it. There are fence corners there now. The road runs West and East until

it gets up about this corner, then turns a little to the left and goes to the Railroad crossing. It curves to the East, clear up on top of the hill. Trees were marked all along there. The line trees were marked by three hacks if the line run North of the trees and if it run South of the trees they were marked by three hacks on the South side. They were the usual surveyor's marks.

190 The corner in the line between the Rains and the Bozeman is a post oak. It is still there. It is marked with an X a little bit on the Northeast side. There used to be a stake driven down there about three to five feet and an iron stob. The post oak is the Southeast corner of Mrs. M. O. Sheppard 36 acre tract. There are no fences there and no fence corners. It looks like there have been.

We run North from the post oak to the center of the old highway and I drove down a pine knot myself. The road has been widened and paved. I could not say whether the stob would have been out in the paved portion of the road now. At that time there were two or three roads there. I took the oldest road to drive the pine knot down. It tallied with the field notes.

When we ran North from the post oak the line passed the Northeast corner of the M. O. Sheppard tract, which corner is marked I think by a red oak 8 or 10 inches in diameter, with an X. The tree is still there. Our line ran from North to the highway."

The Court:

"They agreed that was a boundary line tree."

(Direct Examination Resumed.)

By Counsel for Complainant:

"I never surveyed North of the Gladewater highway. I remember where Wiley Davis land was North of there. At that time the old road did not run there. It went down toward Mr. Davis house and later on the other road was

cut through there. I had nothing to do with cutting the road.

191 I remember where the school house was up there. It stood on the Davis land and was a square acre out of the North east corner of his tract of land. There were some trees there, post oaks and one thing or another. I think the post oaks were marked. They were on the line. I never saw the corner tree at the Northeast corner. Rogers owned the land to the East of the school house. The road when it was cut out North was from sixteen to twenty feet wide. It was fenced but I do not know just when the fence was put up.

I do not know anything about the division between the Rogers heirs. I remember where the old Rogers' house stood. It was South of the highway and there was was a fence running around it at that time. The fence on the East is about where it always stood and the fence went West of the garden. That would make the fence about 100 or 125 feet from the house on the West side. I do not know exactly where the old fence would lay with reference to the fence that is there now but they are approximately in the same place.

Cross Examination.

By Counsel for Defendants:

At the time I made the survey of the West one-half of the Thomason Survey I came to the post oak tree about the Southeast corner of the M. O. Sheppard 36 acre tract. I went North and passed the Northeast corner of the M. O. Sheppard 36 acres tract where there is a red oak. I have never run the line since it was cut out. It was all before them. That corner seemed to be exactly on the line. For all the purposes I have ever known that corner is accepted as the Northeast corner of the M. O. Sheppard 36 acre tract, which also marked the dividing line of the Thomason Survey as far as I know.

192 Q. The Rogers owned it on the East and the Bozeman on the West of the red oak?

A. Yes.

Q. And if the Rogers, in the partition of their father's estate, dropped back 66 feet from the red oak tree, they dropped back 66 feet from the accepted line that your father-in-law ran out?

A. I don't understand you.

"I testified we ran out the line to the red oak and ran it on to the road. That is the Northeast corner of the Haynes tract now. Hayes got the tract from Bob Bozeman.

Q. And the J. M. Haynes Northeast corner in the Highway here is the Northeast corner that you and Mr. Simmons went to when you surveyed to the Highway?

A. Yes, in 1886."

"The J. M. Haynes corner marks that corner. I know where the gear wheel is. It is about 50 or 75 feet East of the Haynes line. Mr. Simmons and I did not establish the line. We ran the East line. That line was well marked when we went there. We ran it. In marking the East line of the Bozeman we recognized that as the East line of the Bozeman.

Q. If the Rogers, in their partition, dropped back over to the gear wheel, they dropped back 60 or 75 feet from the line that you all had accepted?

A. It must be 50 or 60 feet.

"The road South of the Gladewater Longview Highway has never been anything but an outlet for stock until Mr. Bozeman put up a gin and they opened it up.

193 Mr. Rogers had a sawmill North of the house. They had timber down on the South part and they hauled timber from the South. The Rogers used the road to haul logs to and from their mill. They were a

family of lumber-makers, log-haulers and farmers. The road was used for anything they wanted to get out but it was not used much. I cannot recognize any part of the road running South in the picture. It is just a country road running through the trees and used for stock, getting them out of the bottom.

There seems to be a serious controversy as to the location of the Northeast corner of the Clark land and the Northeast corner of the school house tract up there. They put two roads through there. The present road is young but the other one is old. The road cut across the school house corner one time.

Re-Direct Examination.

By Counsel for Complainant:

The Bozeman fence was carried over about twelve or fifteen feet and it would vary. The fence was not exactly straight. It would vary from ten to fifteen feet. That is, the line from the fence. The Bozeman fence was West of the line. It was a rail fence. I cannot say when the Rogers fence to the East was put up. It was several years afterwards though. The fence was not straight on the Rogers site but it seemed to run mostly from tree to tree, zig-zagging about. And it is still that way, so far as I know. The road wobbled around trees it looked like. There are a good many low places up there. I believe there are two bridges after one left the highway
194 going South. There was a low place up there about the Northwest corner of the King tract."

Re-Cross Examination.

By Counsel for Defendants:

"Q. Now, no matter where the Bozeman fence was, it now runs North, and has run North from the red oak tree, and it is on the line that you all subdivided?

A. Yes."

Counsel for Complainant:

"I will now read the direct examination of J. W. Davis from his written depositions, taken by agreement of the parties:

(Thereupon the depositions of J. W. Davis were read in evidence, as follows:)

"J. W. DAVIS, a witness on behalf of plaintiff, was introduced, and being duly sworn to testify the whole truth, deposes and says:

My name is J. W. Davis. I am eighty-two years old and live in Mansfield, Louisiana. I am commonly known as Wiley Davis. I resided at one time in Gregg County. I do not remember what year it was but it was in the 90's though. I think I lived there in 1897 and I lived there seven years before that. I at one time owned a tract of land out of the G. A. Thomason Survey in Gregg County. I purchased the property from the Victory heirs. One of the Victory's married a Stewart.

I am the J. W. Davis named in the deed marked Exhibit "A" from J. T. Victory, et al., to J. W. Davis."

195 Counsel for Complainant:

"We offer in evidence the deed marked EXHIBIT 'A' attached to the depositions.

The Court:

The deed is admitted and is in words and figures as follows:

"WD.

W. H. Victory, et al., to J. W. Davis.

Dated Oct. 17, 1891.

Filed Nov. 8, 1900.

Recorded Vol. R, p. 406, Deed Records, Gregg County, Texas.

State of Texas,
County of Gregg.
Know All Men by these Presents:

That we, J. T. Victory, W. H. Victory, J. W. Victory, M. M. Stewart of the County and State aforesaid for and in consideration of the sum of $200.00 two hundred dollars in hand paid by J. W. Davis of said county and state the receipt which is hereby fully acknowledged do by these presents, grant, bargain, sell and convey unto the said J. W. Davis, his heirs and assigns, all that tract or parcel of land the same being a part of the Headright of

G. A. Thomason, lying and being situated in said County and State about 10 miles West of the Town of Longview, at the NE. corner of a survey made for B. M. Bozeman out of said George H. Thomason Survey;

Thence West 270 vrs. a stake from which a black oak bears N. 30 E. 3 vrs. a pine bears S. 23 W. 10 vrs.;

Thence N. 560 vrs. a stake from which a red oak bears S. 77 E. 13 vrs. a sweet gum bears N. 11 W. 10 vrs.;

Thence East 270 vrs. a stake;

Thence South 560 vrs. the place of beginning, containing twenty-six acres and 7/10 including seven acres, deeded to W. P. Victory by A. White and wife.

Also thirty four acres of land on the Thompson H. R. Survey;

Beginning at W. P. Victory NE. a stake in the center of the Marshall and Tyler road;

Thence North 352 vrs. a stake on the south boundary of the Edwards Survey a red oak N. 40 deg. W. 2-2/10 vrs.;

Thence East with said line 446 vrs. a stake a pine brs. 7 vrs.;

196 Thence South 507 vrs. a stake in the center of the Marshall and Tyler road a red oak S. 33 deg. W. 10 vrs.;

Thence N. 71-1/2 W. with said road 490 vrs. to the place of beginning, containing in all thirty-four acres, more or less.

Together with all and singular the rights, members and appurtenances to the same in any manner belonging.

To have and to hold the said land and premises unto him the said Davis, his heirs and assigns forever, in fee simple and we the J. T. Victory, W. H. Victory, J. W. Victory, M. M. Stewart will and our heirs, executors and administrators forever defend the right and title of said property unto the said J. W. Davis, his heirs and assigns forever, warrant and defend against the claim or claims of anyone lawfully claiming any part thereof.

Witness our hand this the 17th day of October, A. D. 1891.

W. H. VICTORY,
J. T. VICTORY,
J. W. VICTORY,
M. M. STEWART."

(Acknowledgments.)

"I lived on the land while I owned it and lived there about seven years. I knew the Rogerses that lived East of me and I supposed they owned that land. I never had the property surveyed at about the time I purchased it. No survey was made while I owned it. We ran it by the field notes in the deed. I built my fence by the field notes. It had already been surveyed and the corners established. Part of the property was enclosed when I purchased it. None of the East part was enclosed. It was enclosed from that road that turned North as you go around that corner. I fenced all of the second tract. I placed the fence right on the line where the old fence was built, right on that old fence line, it was all there. It was supposed to be somewhere about the line. I do not know whereabouts the line was. I never paid any attention to that line. It was not necessary for me to run that. The old fence was there and I was fencing the land in cultivation. I think there was a road East of the second tract but it did not run with the line. The road turned off from the highway and went down to a little sawmill that Rogers had down there. It did not run with the road I put there. It came into the highway mighty near at the same place it bore to the East. The highway, this road, turned off there and East from the highway right about the corner of that tract of land, a little bit East of it. I constructed a road along the east line of the second tract above referred to. I gave part of that road. We set up stakes as straight as we could get them and left fifteen feet from my line to where I run my fence row. I gave fifteen feet.

197

I don't know whether there was a red oak tree at the northwest corner bearing N. 40° W. 2.2 vrs. I tell you I never fooled with that line, that was the line between this tract of new ground and the twenty six acres of the old place. The twenty six acres or forty acre, I don't remember which.

In the call for the northeast corner of the second tract is "a stake a pine bears 7 varas,"—there was no pine, it was a sweet gum tree.

Q. This is the Northeast corner we are talking about.

Answer: That was a pine, the Northeast corner for the second tract you called it. There was no road there and when I fenced that land there the pine stood outside the road on the Northeast side of the road.

There was a pine knot drove in the ground so many varas from the tree, or links, I don't remember what the distance was, it was out from that pine a little East of North. And when they had the mill there I
198 understand they cut down that pine tree.

At the northeast corner there was woods, and when I was there last there was a post oak not very far from where the corner is. It has grown since I moved away. It might have been a bush; but it was a considerable tree when I was there last, and is now. If they didn't cut it down it is sixteen or eighteen inches through.

I gave McFarlin and William Wright a deed. I didn't own the tract lying to the west of the tract of land conveyed to J. F. Rogers by deed dated February 28, 1899; I wasn't there when that division was made.

That deed was made before I ever went to that place, the Victory Place.

I owned that tract of land lying West of the tract described in that deed. This is the division deed between the four boys. I don't know whether my northeast corner and the Rogers Northwest corner as used on the ground joined each other, as I tell you we surveyed our land by the field notes, I wasn't acquainted with them at the time. I didn't know who owned that land. I don't know where the corner was. I didn't know if there was one or not. At that time there was a big lot of land in that county owned by Cartright. They had a big lawsuit with the Cartrights—they owned all that country west of it. To San Augustine.

I am the Wiley Davis referred to in the first call of said deed from W. H. Rogers, et al., to J. F. Rogers, reading "run West 440 yards to Wiley Davis N. E. corner." I suppose so.

199. When I first went there my northeast corner was marked by a pine knot, with that pine tree as a witness. The corner was Northeast of the tree. Said road ran with my land lines, I gave fifteen feet and it run on that land. There was never no road there until I cut it out. I had no dispute with the Rogers boys over the location of my east line. Frank Rogers and I was discussing the line, he had that tract up there (motions with hand toward window) and he thought the lines come further over there. I told him I didn't know anything about that, I meant to go by the field notes in my deed. No changes have been made in the road at my northeast corner since I sold the same, only it has been widened and traveled a whole lot more when I was up there the last time I stood on the pine stump. They cut the pine tree down and had left the stump in the road, they had leveled it off and had it at the northeast corner of the road. They run over it. If you will go to that corner you will find a big pine stump right close to that post oak. The post oak is to the right of the pine tree a little bit. They may have dug that stump up now.

Counsel for Defendants:

"We offer in evidence the cross-interrogatories and answers."

The Court:

"They are admitted and are as follows:

"I did not have a survey made of my land at the time I purchased it. I accepted the deed. During all the time that I owned my tract of land I did not have it surveyed to determine accurately where my corners were.

200. It is true that there was a school lot or yard which was taken out of the northeast corner of my tract of land. After I purchased my place a road was placed fifteen feet from where my line run

to my fence. The first road I cut it out, and that is all I cut out. Before I purchased my property there was no road there, it was all woods. There was no fence there, no road there, it was all woods. There was no fence there, East. There was an old road on the East end of that twenty six or forty acres, on that old part of it. It run with the lines, I suppose they were trying to go as near the lines as they could. There was a big branch and a hollow there and it may have varied a little on account of that.

This old logging road didn't swing around the corner of the old school yard. Not that acre I give for the school. It was a hundred or two hundred yards West of that road, that new road come down and struck the log road and turned right square North and West out to Sports and Bozemans' places. I suppose the road was then widened and placed down between my property and the Rogers property. It's heap wider now. I left there, I sold that place the next year after I gave that school property away. That was just a little neighborhood road for them to go and come from school and travel through the neighborhood. When the road was run down between my property and the property of Mr. Rogers I built a fence about fifteen feet from the West edge of the road. My property had no fence along the East side at the time I purchased it. When I placed the fence on the East side from the corner, I placed it without having a survey made and just at the point I thought it ought to be. I set stakes up at the corner. We found the witness
201 tree, found the pine knot in the road, and then we set the stakes up and measured from them stakes. At the time I purchased my tract of land there was a sweet gum tree standing at the Northwest corner. On that second tract of land there was no bearing corner that I know of. There was one there I knew but I never hunted it up. I think the Northwest corner of my tract of land at the time I purchased it, was in a field. This had been cultivated as a field before I purchased it. The line was hacked on the trees all the way through to

the Northeast corner. Certainly I saw the bearing tree there. A big pine tree. It stood there until I left there. At what I thought was my northeast corner there was a pine knot at some point in the ground. Within my knowledge this pine knot had never been surveyed out as the corner. There was a man by the name of Greer bought that place before I did and failed to pay for it, and the Victorys and Greer surveyed it out, that is where we got the corners. They went to the corner and hacked the line all the way through. It was woods all the way through. And the post oak right down again the road was the corner with the pine knot in the middle of the Marshall and Tyler road. So far as I know the Rogers Northwest corner and the Davis Northeast corner never did join, as used on the ground. I didn't know nothing about it until after we built the fence. In the deed they claimed Rogers corner run up to my corner, but in that division Flavius Rogers, when they had the land divided they never begun in those corners you are talking about. I got this from Flavius. They commenced at their Southeast corner. They measured half of that tract of land. Alexander Rogers got half and
202 old man Waters got the other half. They surveyed whatever you call it. They measured his half and when old man Simmons, he is very particular about his surveying, when they come in there with a chain to ...ve the amount of land, they set up the corners but it never come to the Bozeman and Walters corner. It left a strip of land in there, from the way they started to survey. If they had begun at this line the strip would have been on the other side, but they begun on the East side and it left the strip on the west side of that land. That thirty six acres of land was Bozeman's land. I don't know whether there was at all times a strip of land between the Rogers Northwest corner and the Davis Northeast corner. I don't know nothing about their surveying in there, not a thing in the world about it. When I went there I was looking after my own land. When I built my fence I went by the deed so as to be sure I was right.

There has never been any dispute between me and any of the Rogers family with reference to a line. Me and Frank Rogers had a little dispute over that, but I told him, I am going by my field notes, here they are you can read them yourself. This is the tree, the notes is there they show it, this is the tree, this is the notes, and that is where I am going to put my fence, you can tear it down if you want to. In fact I have always known that the Rogers line was East of my line. I never knew how much land they had in there, nor how much land they claimed in there. I don't know anything about their line. I know they lived there, and where their land lines were I don't know anything about that.

203 As to whether I have always known that there was a strip of land between my land and the Rogers land, as fenced,—it was not fenced. The land—there was a road there, there was always a road, my fence was fifteen feet from the line and there was a road there. How much Mr. Rogers gave to that road after I left there I don't know. But I have been told my fence was never moved. They considered it the line. This strip of land has remained between the Rogers land and my land, as fenced, up until the time I left there."

JOHN F. BAKER, a witness for complainant, being recalled, testified as follows:

Direct Examination.

By Counsel for Complainant:

I found at the Northwest corner of the Wiley Davis tract a fence to the South and one to the East and West, running from that corner East to the corner that I found in running a line from the Northeast corner of the Sheppard tract there is about 6 vrs. excess over the call, which would make it about 452 vrs. or about 17 feet excess.

Cross Examination.

By Counsel for Defendants:

The North line of the West one-half, as I measured it on the ground, is 964 vrs. It is called 950 vrs. That would make 14 vrs. excess. Accepting the red oak tree and the post oak tree as a dividing line of the tract, by running a line North, that would put the line at the point I have designated, the dividing point. That would make the North and South line excessive. The South line of the East one-half is 967 vrs., which is 17 vrs. over
204 the call, which is 17 vrs. excess or about 50 feet. The North line is 982 vrs. or an excess of 32 vrs. The line from B to A is 404 vrs. and from A to the dotted line is 71 vrs., which would aggregate 475 vrs. on the South line of tract No. 1. That is the distance called for in the deed. I show the North line to be 487 vrs. on the same tract. The South line is about 12 vrs. less than the North line."

BEN LEUTY, being recalled by complainant, testified as follows:

Direct Examination.

By Counsel for Complainant:

"Q. Mr. Wynne was asking you this morning, I believe it was, about this call from "I" to "B", and what would happen if you ran South 1 degree 3 minutes East from your point up at "I". What course did you run from "I" to "B"?

A. South 1 degree, 3 minutes East.

Q. Where would it have put you, had you run South from "I" on your measurement?

A. About 45 feet—

The Court:

He testified to that.

Mr. Trammell:

I asked the witness if he had taken "I" and had run South on his measurement, where would he have been when he got to "B".

The Court:

He evidently would have been West of there; but I understood him to say this morning that he went straight South,—did not say he had run a course 1 degree 3 minutes East.

205 Mr. Trammell:

I think you misunderstood him, because it shows he ran 1 degree 3 minutes East.

Mr. Wynne:

Your Honor did not misunderstand him. He said his map showed a straight South line—I asked him if he got over in the fence, and ran South with the fence, straight South, it would put him to the gear wheel; and he said it would.

The Court:

Go ahead.

Mr. Trammell:

Q. What was your understanding of the question, and what you answered in that regard?

A. I understood him to ask me how far East of my point "B" I would hit if I ran it 1 degree further East?

Q. Well, now what course did you run from "I" to "B"?

A. South 1 degree 3 minutes East.

Q. On your measurement?

A. Yes.

Q. Do your measurements vary in that respect?

A. Yes.

Q. What would be South on one instrument would vary on another instrument?
A. Yes.
Q. Have you calculated the acreage?
A. Yes.
Q. How much in there?
A. 70.02 acres."

Cross Examination.

"Q. Ever since you got the ratification, you have claimed 70 and some odd acres, instead of 68
206 acres; haven't you?
A. We calculated it at 70.02 acres.
Q. Your map shows that this line runs straight South; doesn't it?
A. No, sir.
Q. The line isn't drawn that way?
A. It shows the bearing right there.
Q. Do you mean to say that beginning at "I", and running straight South would put you over in Haynes' field?
A. Yes.
Q. That is what you are swearing to the Court?
A. Yes."

"It is stipulated that the Empire Gas & Fuel Company had a permit to do business in Texas and that the Empire Oil & Refining Company has a permit to do business in Texas."

"It is further stipulated that Empire Gas & Fuel Company and its successor in title, Empire Oil & Refining Company, said latter company having succeeded to all the title of the former company in and to said oil and gas leases, took possession of the land described in the oil and gas lease and the correction oil and gas lease, and drilled for oil thereon and has produced and is now

207 producing oil from said land and has paid the rentals and royalties therein provided. It is further stipulated that none of the parties to this lawsuit have drilled any wells on the strip of land involved in this controversy."

"Except for some dates we want to put in we rest."

Complainant Rests.

Counsel for Defendants:
"We offer in evidence patent from the State of Texas to M. Cartwright, assignee of George A. Thomason, being EXHIBIT No. 24."

The Court:
The exhibit is admitted in evidence.

(Exhibit No. 24 is the same as Exhibit No. 1, and will not be recopied at this place.)

Counsel for Defendants:
"We offer in evidence deed from Matthew Cartwright to Benjamin N. Hampton, being EXHIBIT No. 25."

The Court:
The exhibit is admitted in evidence.

(Exhibit No. 25 is the same instrument as Exhibit No. 2, and will not be recopied at this place.)

Counsel for Defendants:
"We offer in evidence deed from Mr. Cartwright to B. N. Hampton, being EXHIBIT No. 26."

The Court:
The exhibit is admitted in evidence and is in words and figures as follows:

208 Warranty Deed.

M. Cartwright to B. N. Hampton.

Dated: June 16, 1851.

Filed: .....

Recorded: Vol. C, page 256, Deed Records, Gregg County, Texas.

The State of Texas,
County of Upshur.
Know All Men by these Presents:

That I, Matthew Cartwright of said State and County of San Augustine, for and in consideration of the sum of Ten Dollars to me in hand paid the receipt whereof is hereby fully acknowledged.

Have granted, bargained, and sold and by these presents do grant, bargain, sell, alien, convey and deliver unto Benjamin N. Hampton, his heirs and assigns forever the following described land, to-wit:

Six hundred and forty acres, headright of Jessee T. Bullock, situated in said county and state aforesaid secured to me as assignee of said Bullock by patent dated at the City of Austin 9th May, A. D. 1851, No. 89, Vol. 5; six hundred and forty acres of land the headright of Robert Burton. Situated in said State and County, secured to me as assignee of said Burton by Patnet No. 818, Vol. 3, issued at the City of Austin, 10th May, A. D. 1851. Three Hundred and twenty acres of land the headright of Carl Rhodes situated in the said State and County secured to me as assignee of said Rhode by Patent No. 645, Vol. 6, issued at the City of Austin 13th May, A. D. 1851, together with all and singular the hereditaments and appurtenances unto the same belonging.

To have and to hold the same unto said Benjamin N. Hampton, his heirs and assigns forever against the claim of myself, my heirs or assigns and all persons whatever claiming by or through me.

In testimony whereof I have hereunto set my hand and seal using a scroll for seal this 16th day of June, A. D. Eighteen hundred and fifty-one (1851).

(Seal) M. CARTWRIGHT.

Witnesses:

C. C. GALLOWAY,
O. E. ROBERTS."

(Acknowledgment.)

209 Counsel for Defendants:

"We offer in evidence deed from B. N. Hampton to A. Moseley, being EXHIBIT No. 27."

The Court:

"The exhibit is admitted in evidence and is in words and figures as follows:

"Warranty Deed.

B. N. Hampton to A. Moseley.

Dated: April 6, 1853.

Filed: .....

Recorded: Vol. D, page 499, Deed Records, Upshur Co., Texas.

The State of Texas,
County of Upshur.
Know All Men by these Presents:

That I, Benjamin N. Hampton, of the County of Hopkins in the State of Texas, for and in consideration of the sum

of Three Thousand Seven hundred and eighty dollars to me in hand paid by Augustus Moseley, the receipt whereof is hereby acknowledged have this day bargained, sold and conveyed and do hereby bargain, sell and convey unto the said Augustus Mosely all that tract or parcel of land, situated and described as follows, to-wit:

In Upshur County on the waters of Moodies Creek about fourteen miles South from the town of Gilmer described as follows, to-wit:

Beginning at the NE. corner of Survey No. 173 made for B. N. Hampton, Administrator of the estate of George Hampton, dec'd, a stake from which a pine bears S. 37 deg. W. 2-2/10 vrs. and another pine bears S. 26 deg. E. 12-2/10 varas;

Thence West at 2850 varas a stake at the NW corner of a survey made for Benjamin N. Hampton, Admr. of the estate of James Roark, dec'd., N. 174 a stake from which a black oak bears S. 34½ deg. E. 11 vrs. a black oak bears S. 33½ deg. W. 6 varas;

Thence South at 1900 vs. the SW. corner of said survey No. 174 a stake from which a pine bears S. 87 deg. E. 7 vs. a red oak bears N. 61 deg. E. 8 8/10 varas;

Thence East at 1900 varas to a stake;

Thence South at 1900 vrs. a stake from which a pine bears S. 81 deg. E. 1 6/10 varas and another pine bears S. 11 vs.;

Thence East at 950 varas a stake on the South East corner of Survey No. 175;

Thence North 3800 varas to the place of beginning, containing twelve hundred and eighty acres of
210 land and included survey No. 173, containing two hundred and forty nine acres; survey No.

174 containing one hundred and eighty eight acres of land, and the East half of survey No. 175, containing three hundred and twenty two and two-thirds acres of land, of the Headright of Haden H. Edwards, together with all and singular the rights, members, hereditaments and appurtenances to the same belonging or in anywise incident or appertaining.

To have and to hold said premises hereinbefore described unto the said Augustus Mosley, his heirs and assigns forever and I hereby bind myself, my heirs and assigns forever and I hereby bind my executors and administrators to warrant and forever defend the titles to said premises above described unto the said Augustus Moseley, his heirs and assigns forever.

In testimony whereof I have hereunto set my hand and seal using a scrawl instead of and for a seal on this sixth day of April in the year of Christ one thousand eight hundred and fifty three the, word South enterlined before signing.

(Seal) B. N. HAMPTON.

Test:

HEZEKIAH BARNES."

(Acknowledgment.)

Counsel for Defendants:

"We offer in evidence deed from A. Moseley to Alexander Rogers, being EXHIBIT No. 28."

The Court:

"The exhibit is admitted in evidence."

(Exhibit No. 28 is the same as Exhibit No. 4, and will not be recopied at this place.)

Counsel for Defendants:

"We offer as EXHIBIT No. 30, etc., various deeds from the heirs of Moseley to B. F. Phillips, dated in 1935 and 1936."

Counsel for Complainant:

"We object."

Counsel for Defendants:

"We offer them on the theory that if the East half that was surveyed could be held to the 880 yards
211 .. in our conveyance, then the Moseley would be left, as we view it, with the balance of that distance in there; so, in order to make our title perfect, even over to the Bozemans, we have six quitclaim deeds from each one of the Moseley children into B. F. Phillips, and from B. F. Phillips to our man. So, if the conveyance did not cover that entire distance in there, we would have the title out of the Moseley heirs, as well as out of the other people."

Counsel for Complainant:

"We object. The conveyance very clearly covers the East half of the survey."

The Court:

"The objection is overruled."

Counsel for Complainant:

"We except. May we have the same objection and exception to all instruments?"

The Court:

"Yes."

Counsel for Defendants:

"We offer in evidence quitclaim deed from Mace Moseley to B. F. Phillips, et al., being EXHIBIT No. 30.

The Court:

"The exhibit is admitted in evidence and is as follows:

"Quit Claim Deed.

"Mace Moseley, et al., to B. F. Phillips.

Dated: January 21, 1935.

Filed: January 24, 1935, at 3 P. M.

Recorded: Vol. 176, page 392, Deed Records, Gregg County, Texas, File No. 820.

The State of Texas,
County of Gregg.
Know All Men by these Presents:

That Mace Moseley, Holt Moseley and wife,
212 Edith Moseley, of the County of Knox and State of Texas, for and in consideration of the sum of twenty-five No/100 dollars to us in hand paid B. F. Phillips of the County of Gregg and State of Texas, the receipt of which is hereby acknowledged, do by these presents bargain, sell, release and forever quitclaim unto the said B. F. Phillips, his heirs and assigns, all our right, title and interest in and to that certain tract or parcel of land lying in the County of Gregg, State of Texas, described as follows, to-wit:

A part of the Geo. A. Thomason survey and more particularly described as follows, to-wit:

Beginning at the SE. corner of the Geo. A. Thomason survey;

Thence N. along the E. line of said survey to the N. E. corner of said survey;

Thence W. with the N. line of said survey 950 vrs. to a point for a corner;

Thence S. to the S. line of said survey for a corner, said corner being 950 vrs. W. of the SE. corner of said survey;

Thence W. with the S. line of said survey to a point for a corner which is 950 vrs. E. of the SW. corner of said survey;

Thence N. to a point in the N. line of said survey which is 950 vrs. E. of the NW. corner of said survey;

Thence E. with the N. line of said survey to the place of beginning.

To have and to hold the said premises, together with all and singular the rights, privileges and appurtenances thereto in any manner belonging unto the said B. F. Phillips, his heirs and assigns, forever, so that neither we, the said grantor nor our heirs, nor any person or persons claiming under us shall at any time hereafter, have, claim or demand any right or title to the aforesaid premises or appurtenances, or any part thereof.

Witness our hands at Knox City, Texas, this 21st day of January, A. D. 1935.

MACE MOSELEY,
HOLT MOSELEY,
EDITH MOSELEY."

(Acknowledgments.)

213 Counsel for Defendants:

"We offer in evidence quitclaim deed from Margaret Moseley Grimmer Powell, et vir. to B. F. Phillips, being EXHIBIT No. 31."

The Court:
"The exhibit is admitted in evidence."

(The quitclaim deed is signed by Margaret Moseley Grimmer Powell and S. J. Powell, and B. F. Phillips is named as grantee. It is dated January 21, 1935; filed for record January 24, 1935, and recorded in Volume 176, page 393. The metes and bounds description is the same as that contained in Exhibit No. 30 above and, for the purpose of shortening the record, the deed is not copied in haec verba.)

Counsel for Defendants:
"We offer in evidence quitclaim deed from Ben Moseley, et al. to B. F. Phillips, being EXHIBIT No. 32."

The Court:
"The exhibit is admitted in evidence."

(The quitclaim deed is signed by Ben Moseley, Zoa Moseley, Judson Moseley and Ellen Moseley, and B. F. Phillips is named as grantee. It is dated January 17, 1935; filed for record January 24, 1935, and recorded in Volume 176, page 395, Deed Records of Gregg County, Texas. The metes and bounds description is the same as that contained in Exhibit No. 30 above, and, for the purpose of shortening the record, the deed is not copied in haec verba.)

Counsel for Defendants:
"We offer in evidence quitclaim deed from Minnie Moseley Ware, et vir, to B. F. Phillips, being EXHIBIT No. 33."

The Court:
"The exhibit is admitted in evidence."

214 (The quitclaim deed is signed by Minnie Moseley Weir and Charlie Weir, and B. F. Phillips is

named as grantee. It is dated January 18, 1935, filed for record January 24, 1935, and recorded in Vol. 176, page 396 Deed Records of Gregg County, Texas. The metes and bounds description is the same as that contained in Exhibit No. 30 above, and, for the purpose of shortening the record, the deed is not copied in haec verba.)

Counsel for Defendants:

"We offer in evidence quitclaim deed from A. W. Moseley, et ux. to B. F. Phillips, being EXHIBIT No. 34."

The Court:

"The exhibit is admitted in evidence."

(The quitclaim deed is signed by A. W. Moseley and Mrs. Nadine Moseley, and B. F. Phillips is named as grantee. It is dated January 16, 1935, filed for record January 24, 1935, and recorded in Vol. 176, page 398 Deed Records Gregg County, Texas. The metes and bounds description is the same as that contained in Exhibit No. 30 above, and, for the purpose of shortening the record, the deed is not copied in haec verba.)

Counsel for Defendants:

"We offer in evidence quitclaim deed from Boyd Moseley, et ux. to B. F. Phillips, being EXHIBIT No. 35."

The Court:

"The exhibit is admitted in evidence."

(The quitclaim deed is signed by Boyd Moseley and wife, May Moseley, and B. F. Phillips is named as grantee. It is dated January 19, 1935, filed for record January 24, 1935, and recorded in Vol. 176, page 399-400, Deed Records Gregg County, Texas. The meters and bounds description is the same as that contained in Exhibit No. 30

above, and, for the purpose of shortening the record, the deed is not copied in haec verba.)

Counsel for Defendants:
"We offer in evidence quitclaim deed from Annie Moseley Jordan, et vir. to B. F. Phillips, being EXHIBIT 36."

215 The Court:
"The exhibit is admitted in evidence."

(The quitclaim deed is signed by Annie Moseley Jordan, et vir. and B. F. Phillips is named as grantee. It is dated January 22, 1935, filed for record January 24, 1935, and recorded in Vol. 176, page 400 Deed Records of Gregg County, Texas. The metes and bounds description is the same as that contained in Exhibit No. 30 above, and, for the purpose of shortening the record, the deed is not copied in haec verba.)

Counsel for Defendants:
"We offer in evidence quitclaim deed from W. Howard Moseley, et al. to B. F. Phillips, being EXHIBIT No. 37."

The Court:
"The exhibit is admitted in evidence."

(The quitclaim deed is signed by R. L. Moseley, W. H. Moseley, Effie Moseley, E. J. Moseley, Minnie Moseley, Chas. Moseley, Ludie Moseley, Agnes Conner and A. B. Conner, and B. F. Phillips is named as grantee. It is dated January 15, 1935, filed for record January 24, 1935, and recorded in Vol. 176, page 389 Deed Records of Gregg County, Texas. The metes and bounds description is the same as that contained in Exhibit No. 30 above, and, for

the purpose of shortening the record, the deed is not copied in haec verba.)

F. E. ROGERS, a witness produced by defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendants:

"My name is F. E. Rogers and I am one of the defendants in this suit. My father's name was Alexander Rogers. He was the same Alexander Rogers who acquired the East half of the Thomason Survey from Moseley.

My father died in 1891. After the death of my father the heirs made a partition of the land among
216 themselves. Four boys were living at that time. The east half was rated as 320 acres in the deed.

When we went to partition the same, we employed J. H. Simmons to make a survey. I knew Mr. Simmons and Mr. Simmons is the same man who surveyed out the West half as testified by Mr. York. We employed him a long time after 1880 when he had established the red oak and the post oak tree.

When he came out to make the survey, I went with him. We four boys were the chain-carriers.

Q. What did you say to Mr. Simmons, and what did he say to you, about the partition of the land, and how you would partition it?

Counsel for Complainant:

May we have an objection to all of this as irrelevant and immaterial, and incompetent in view of the calls in the deed, which call from a point to a point, the Northwest corner of our tract calling for an adjoinder of the Wiley Davis tract outside of this land? It varies the terms of a written instrument.

The Court:
The objection is overruled.

Counsel for Complainant:
We except; and may we have a general objection and exception to all that, so we need not repeat it?

The Court:
Yes.

(Direct Examination Resumed.)

Counsel for Defendants:
Q. Tell what you said to Mr. Simmons.
A. I asked him if he could do some survey-
217 ing for us; and he said he could, and came down. And he said: 'Do you know of a definite corner that we can start from.'"

Counsel for Complainant:
"We object—"

The Court:
"It was in fact a partition, wasn't it?"

(Direct Examination Resumed.)

Counsel for Defendants:
"Mr. Simmons went to the Northeast corner of the old home place and he found the markers that looked like they had been there for ages and ages. That is the Northeast corner represented by the fence corner up there at the Northeast corner of the 25 acre tract. If this map (Exhibit No. 14) represents the 320 acres we began at the Northeast corner.

I told him I wanted him to divide that land into four 80 acre blocks. He ran West 440 yards and then ran South what we would term one-half of the ground, 880 yards I believe. He then ran back to the East line and

established that tract as Block No. 1. That made a block 440 yards by 880 yards and that was Block No. 1 to W. H. Rogers."

Counsel for Complainant:

"Of course nothing in the field notes indicated that, and we object for the reasons stated."

The Court:

"I understand. Your objection and exception goes separately to all this character of testimony."

(Direct Examination Resumed.)

Counsel for Defendants:

"Mr. Simmons then came back and started to surveying off Block No. 2, which was the J. F. Rogers tract. He came back to the North line and ran over 440 yards for the 80 acre marker and he said 'Boys, you have got a chain here left over there,' and my two oldest brothers said:

'We will just keep that like it is.'. We were using
218 that for a road at that time of year. We had sold the mill but the road was still there. That is at the Northwest corner.

He drove his stake right at 440 yards and then he went South 880 yards. He came down to the half way point and drove a stake in the ground there. He just put in a small piece of green pine temporarily at that point. He then went over and surveyed out the old home place for myself and my brother, J. W. He got that all in the field notes and went home. The old man was old, and it was several days before he wrote up the deeds, then, when he delivered the deeds, we carried them to W. E. Foshee, a Notary Public in Gladewater, and signed them up. My older brother, John, and myself were single; and the other two boys were married. They had homes on those blocks and we were single; and we just blocked ours together.

We two single boys took the South end. That stake that Mr. Simmons drove at the Southwest corner of the J. F. Rogers tract and the Northwest corner of mine and my brother's tract was where the old gear wheel is now.

Q. Here is the gear wheel right here.

Counsel for Complainant:
"We object to all those stakes at the gear wheel as not being called for in any instrument."

The Court:
"Yes."

"I do not know what became of that stake that was placed there by Mr. Simmons at the time he made the survey. There is a pinion shaft out of an old sawmill there now. It has been there a long time.

219 Later on I sold my tract of land to Burnett. Burnett sold to Evans and it came on down until King got it. We did not have any fences at the stob at the Northwest corner and Southwest corner of the tract. We did not later put any fences. The South part was later sold to Pinkney Davis and he fenced over to the gear wheel. He then fenced the trees along there and made a pasture. South of the gear wheel and West of the gear wheel in the old roadway is where the Z. M. Simmons well is located. It is located East of the Sheppard fence. My nephew had a calf pasture in there running North from the stob. His name is J. E. Rogers, who is called Dink. At the time I sold my tract of land to Burnett, I did not point out to him anything with reference to the gear wheel. I just made a deed to him to the 880 yards as I had it. He is not the man who put the fence there but Pinkney Davis got ahold of it and put the fence in.

Since the division between the heirs and the establishment of the 440 yard corner at the North and the estab-

lishment at the corner where the gear wheel is located, a road has been open for the use of anyone who wanted to travel it.

To my own knowledge, J. E. Rogers, Mrs. Waskom and Mrs. L. J. Rogers never claimed that road as against the children of Alexander Rogers. Up until the time the Empire filed this suit I had never known of anyone claiming this road as against us.

At the time Mr. Cox came over there to see me I do not know whether he had an abstract or not. He had some documents and papers and an additional lease. He said the ratification was identical with the Chandler lease. I looked at the paper and read down to where everything was reduced to feet and did not figure it to see if it was correct. Mr. Cox said: 'This is identical,—the same thing as the Chandler lease, but reduced to feet, and covers the same acres, and covers the same land.' I had no interest in the Dink Rogers tract as surveyed by Mr. Simmons. That had been settled."

Cross Examination.

By Counsel for Complainant:

"We did not have much discussion about what was in the lease. I told him the lease was supposed to be 440 yards and so many yards this way and I said, 'your lease now is in feet. I do not know if that is correct or not.' Ben Cox and Dink Rogers left the house but I do not know where they went. I do not know if they came back together. I did not see them after that. I did not see the abstract. I said to Dink: 'if this is the same as the Chandler lease, I see no objection to your signing it.' I told Dink, 'I do not know whether that inclusive clause was in there or not.' If the inclusive clause was in the part that Dink was leasing I had nothing to do with it. I do not know whether I told him about the clause or not. I was with them about ten minutes. They then came to my house and stood on the front porch and talked five or

ten minutes. I did not go to Dink's house. My house was about two and a half miles from Dinks. Dink and Ben Cox came to my house and I do not remember whether Patterson was there.

When we had this land surveyed, Mr. Sim-
221 mons did not survey all around it but surveyed all around the North end. He began at the Northeast corner and surveyed West 440 yards and then came South 880 yards and ran back East 440 yards and made a deed to Block 1 to W. H. Rogers from those field notes.

He did some extra surveying before he made the deed. He then cut off J. F. Rogers tract, which is 440 yards East and West and 880 yards North and South.

I knew where Wiley Davis lived. I knew where the pine tree stood in his Northeast corner. It stood out Northeast of the school house. I know where the old road jogged around the pine tree. When they cut the road up there the road came almost to the pine tree, I guess. I do not know when the school house was built up at the Northwest corner of the land. It was built after the partition, I think. I knew where it was located. I did not help cut the road out to the school but I hired some men to work from a certain point. Wiley Davis cut from here to where he had his fence. The Gladewater Highway shown on Exhibit No. 14 comes across about the middle of the F. E. Rogers tract, as indicated on the map. The Wiley Davis land is North of the highway. He had the tract North of the highway that the school house was later put on.

I hired somebody to help cut the road out North of the highway about half way between the highway and the two acre block there. We had a fence here. The mill was North of the highway and I have marked it with an X. The mill and the house were both North of the highway. We had a road along here that turned out from the Longview-Gladewater road and came through the woods and went out to the Wiley Davis land. It was
222 the Victory land then. The road was closed to the Northwest corner of the Wiley Davis tract

and ran diagonally across the Davis land. Davis kind of intimated he did not like it too well about the log trains coming across his land and we cut the road through here. The road that Davis had cut out came from the highway up here. Not quite to the 2 acre tract. We cut the road out and went up to about where the school house was afterwards put, following along Davis' East line. That was before the partition. I knew where Davis' East line was. There were marked trees there. There were marked trees along Davis' East line and our West line. Those trees were cut down when I built the road. They were right in the road as I cleared it out. That pine tree died and caught fire and burned up. It is a big pine that represented the Northeast corner of the Wiley Davis tract and it is not there now. I do not believe anybody can find the corner now. If the road that Davis and I and the others had cut out had gone on straight North to the North line of the Thomason Survey and continued on North it might have run over the pine tree. The pine tree was about seven feet from where the pine knot represented the corner.

Mr. Simmons only surveyed the center line of the 160 acres partitioned to me and my brother and wrote the balance up from the deed.

Q. But surveyed out the North tract?
A. He surveyed this line here.
Q. This is the Bozeman tract?
A. Yes.

223 "My father deeded the land to my mother. Louisa, and four of their children were living at the time of the partition. The children living were W. H., J. F., John and myself. J. W. Rogers is dead. He did not have any children. Frank Rogers is dead and left a son, J. E. Rogers, and a daughter, Elvie Waskom, and his wife, Mrs. L. J. Rogers. J. F. Rogers died in April or May, 1899, not long after the partition.

That road that I cut out from the Gladewater Highway along Wiley Davis line and my line was originally about twenty feet wide. It was just a country road. Wiley Davis fenced along the East side of it but not at that time. He fenced it later. Wiley Davis fenced along his East line and on the West side of the road. Dink and his Uncle, John Boles, fenced along the East side of the road. They fenced it after J. F. Rogers died but I do not know just how long. I knew the land was clear and fenced.

I have lived all my life not very far from the tract. I knew it was cleared out. I expect the road was fifty or sixty feet wide between Dink's West fence and Davis fence in the old days. It was never fenced West of the 440 yard measurement that Simmons made. Part of the fence J. W. Mings built there on the line of the two acres is still there. I know when the two acre tract in the Northwest corner was sold. I had nothing to do with the sale. I guess it was surveyed. Dink was not of age at that time but there is no question about that. I know where the post oak tree is at the Northwest corner. The post oak tree marked the Northeast corner as called for by the field notes. I do not think the line runs West from there 147 feet. I do not think the deed calls for it that way. The deed says it runs 953 varas West
224 of the Northeast corner. That puts it on Simmons 440 yards. I had nothing to do with writing the deed to J. W. Mings but I have read it but not recently. I do not know just when.

I do not know about the North line being 147 feet from the post oak. I do not know about the post oak. I know there are some post oaks in there but I do not know whether they are at the corner. There are a bunch of post oaks there. I do not know if there is a post oak marked there at the fence. I am not disputing that there are post oaks there that would fit the bearing. The deed calls for a black jack tree at the Southwest corner and I saw the black jack tree at the edge of the road.

I know when Doc sold off 25 acres to Mrs. Waskom. I did not know or hear that he made the corner up there 487 vrs.

For a good while I was gone and not around here. I was East of Gladewater, near Longview, but I came back to visit my brother and family.

Simmons made out the deeds after he made the survey. It seems to me that he made out the deeds about a week or ten days after he made the survey. I believe he made the survey in a day. There was no fence around the old home place at that time except a horse lot and a garden and an orchard. It was fenced but not connected with the farm. The farm was South.

Simmons did not mark anything on the East line of the survey except at the Southeast corner. He marked a tree here and there and he put a stake in the ground over here. He marked a big red oak at the South-
225 east corner and he put a stake at the North-west corner. He put a stake at the Southwest corner. I do not remember whether he put a stake between Frank's tract and Doc's tract."

Re-Direct Examination.

By Counsel for Defendants:

"I never saw Mr. Cox after the ratification deed was signed. I did not see him when Dink talked to him."

Re-Cross Examination.

By Counsel for Complainant:

"I have seen the two acre tract out of the Northwest corner of the J. F. Rogers tract lately and it is fenced where it used to be fenced. It is now fenced right about where it had been fenced for a long time. There is a fence on the West side of it next to the road. That fence is now where it stood practically all the time. I do not know whether it has been moved or not. I expect that fence on the West side is about fifty feet East of the pine tree that stood at the Northeast corner of the Davis tract."

Re-Direct Examination.

By Counsel for Defendants:

"I know where Dink built his house, South of the two acres and it is a good piece from the road. I think the front of it would be thirty-five feet from the road. There is a filling station down there and it may be about at the corner of the East line.

Mr. Simmons' chain measured out in yards. That is the only surveying I ever did."

226 M. H. HACKNEY, a witness produced by defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendants:

"My name is M. H. Hackney and I live at Longview and am a land surveyor and have been a surveyor for seventeen years. I have been surveying in East Texas a little over five years.

I have had occasion to survey land in and around the Thomason and Rhodes Surveys in Gregg County. I had occasion to survey out the East half and the West half of the Thomason Survey, as it is located out on the ground.

Q. It has been agreed that the red oak tree on the East line of the Thomason Survey at point "B", as shown on that map, represents the East line of the Thomason Survey, and that the Northeast corner is located North of that line at the point shown. This is Exhibit No. 14. *We further agreed that the East dividing line as established on the ground, is at a point running through the red oak, at the Northeast corner of the M. O. Sheppard tract.*

Now, that has been stipulated."

"I have had occasion to survey North from the Southeast corner of the M. O. Sheppard tract and the Northeast corner is designated by a red oak tree. I ran my

line from the post oak tree at the Southeast corner of the M. O. Sheppard tract North. This line which I ran North goes a little bit West of the red oak tree at the Northeast corner of the M. O. Sheppard tract
227 and will pass the Phillips well to the West a distance of about 18.9 feet. The red oak is about one-half vara East of the line I ran."

By Counsel for Defendants:

"Q. The East half and the West half of the survey *is divided by a line running North from the Northeast* corner of the M. O. Sheppard 36 acres tract. Now, extending that line on North, as called for, which direction will it be from the Phillips well, and how far?"

A. You ask if you produce the line from this corner through the red oak?

Q. Yes, right on North?

A. I could not answer, because I don't place that line through that red oak. I ran North from this post oak, the Southeast corner—

Q. Yes.

A. Which places the line a little bit to the West of the red oak.

Q. But it still will be which side of the Phillips well?

A. On the West.

Q. On the West side?

A. Yes.

Q. And how far?

A. 18.9 feet.

Q. All right. That is what I thought you said. And if you produce it from the red oak on North, it would still be further West of there, because the red oak is a little bit West of the line you ran?

A. It is East of it.

228 Q. East of it, about how far East?

A. The red oak is approximately in a true East direction. It is mighty little bit to the East. I would not say over half a vara.

Q. Then it is about 16 feet from the point East of the red oak?

A. Yes.

Q. Then if we have agreed that the red oak is the dividing line, it would be about 16½ feet East of the dividing line?

A. Yes.

Q. Then, producing that line on to the North, would not come anywhere East of the Phillips well?

A. No.

Q. As located on the ground?

A. No.

Q. Producing that line on North from the red oak tree would be how far West of the gear wheel, as located on the ground?

A. Well, approximately 66 feet.

Q. The line that you made from the post oak tree is what I am talking about?

A. If I ran North from this post oak?

Q. Yes.

229 A. I am 92 feet West of the bevel gear.

Q. If you run North from the post oak?

A. Yes.

Q. Now, the red oak is a little bit East of your line?

A. Yes.

Q. Did you survey the line from the red oak tree on the East line of the agreed boundary line there, did you move the line across to the East—West to the bevel gear?

A. Yes."

"I surveyed out the partition tracts as I found them on the ground. In surveying out the tract partition to J. W. Rogers and F. E. Rogers, being the King tract, the deed calls to run 880 yards to the West and I
230 ran that line. In running that line 880 yards to the West it came within one hundredth of a yard short of the bevel gear. Beginning at the red oak tree on the agreed East boundary line and running West 880 yards, I came within one hundredth of a yard of the bevel gear. I ran a traverse line from the bevel gear Northward. I did not detail all the evidence along that

line. In 1932, as I recall, in a reconnaissance look-around there was evidence of a fence running from the North to the bevel gear."

Cross Examination.

By Counsel for Complainant:

"I did not put that fence line down running North from the bevel gear but I said that was reconnaissance,—just a look around. I was not making a survey at that time. As I said, I did not make a survey at that time and I would not remember just how that fence stood up there.

I surveyed from B on Exhibit No. 14 to the bevel gear. I detailed the area immediately West of the bevel gear. That survey was in 1935. I do not recall whether there was a slush pit at the Southwest corner of the J. F. Rogers tract. It seems that there was but I would not say for sure. I found marked trees. I found a 36 inch red oak with three hacks on the West. It was North 28 degrees 35 minutes west 43.6 feet from the bevel gear. Those were some trees put in the fence line. I located a ten inch post oak with an X on it West of the bevel gear and there were references to an inch and a half iron pipe. The iron pipe was South 89 degrees 1 minute 23.53 vrs. from the bevel gear and there was
231 no delineation allowance to be taken in on the instrument. That would be almost West. That is all of the surveying I did on that particular tract.

I did not try to survey out the Rogers partition."

SETH DAVIS, a witness produced by defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendants:

"My name is Seth Davis and I live near Forney and am a farmer. I was born in Gregg County and am a half

brother of Dink Rogers. I lived on the old Rogers homestead with Dink and his mother for about a year. It was in 1934 or 1935.

I was out there with them in the old days shortly after the partition was made.

Q. Did you have occasion to do anything with reference to the Southwest corner of the J. F. Rogers tract, as it had been partitioned?

A. Nothing more than my mother asked me to go out there, and put this wheel axle down in the ground for a corner post."

Counsel for Complainant:

"We object to all this. It is not called for in the field notes."

The Court:

"Overruled."

Counsel for Complainant:

"We except."

232 By Counsel for Defendants:

"Q. Did you locate that wheel at any spot down there?

A. Right at the corner.

Counsel for Complainant:

"We object to that as a conclusion.

The Court:

"Sustained."

By the Court:

"Q. Was the place marked where you took this to?

A. There was a stob there."

(Direct Examination Resumed.)

By Counsel for Defendants:

"I placed the wheel right at the side of the stob. My mother asked me to do that. She said that she wanted me to do that so she could tell where the lines were. Dink went with me. He was a kid though and younger than I was. The sprocket wheel was there in 1934 or 1935. We brought it from the mill. It was still in the ground in 1934 at the same place. I do not know who claimed the land West of the sprocket wheel any more than my mother wanted me to go out there for her and put this down for a corner."

Cross Examination.

By Counsel for Complainant:

"I was not there when the partition was made. All I know about it was putting this wheel axle down there. My mother told me to put it at the corner where she showed me. She showed me a day or two before where to put it. There was nothing there other than the post. I do not know whether it was a pine or a hickory or what.

233 Counsel for Complainant:

"We object to this testimony as hearsay, and immaterial, and irrelevant, and incompetent.

The Court:

"You say that was shortly after the partition was had?

A. Yes.

The Court:

Objection overruled.

Counsel for Complainant:

We except. And we further object to it as being in derogation of the deed Mrs. Rogers executed.

The Court:
Overruled.

Counsel for Complainant:
We except."

J. W. MINGS, a witness produced by defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendants:

"My name is J. W. Mings and I live at Marshall. I am the same J. W. Mings who at one time owned the 25 acres out of the Northeast corner of the Thomason Survey. I am also the same one who, at one time, owned a two acre tract out of the Northwest corner of the J. F. Rogers tract. At the time I purchased the two acre tract I fenced it. I have seen it in the last year or two, having passed by it. The fence is practically in the same place it was when I fenced it. I knew where
234 the school house tract was at the time. I also knew where the Sport tract was on the Northeast, which is now the Bouknight tract. I do not think there was a pine tree up there at the Southeast corner in those days. I judge that the Bouknight tract and the school house tract were about thirty-five or forty feet across the way from where I fenced the two acres. I did not measure it and that is just an estimate. I do not remember the old pine tree, if there ever was one there. There was a road going from my two acres on the South. The road went on South as far as the railroad. I think there was something that marked the Southwest corner of the J. F. Rogers tract. I do not remember anything about it."

Cross Examination.

By Counsel for Complainant:

"I bought the two acres in 1910, I believe. That is my recollection of it. I bought twenty-five acres from Mrs. Walker and I bought two acres from Mrs. Rogers. I do not recollect if there was a post oak at the Northeast corner of the 2 acre tract. I started my fence at the Northwest corner over by the road and fenced it up. My deed from Mrs. Rogers calls to begin at the Northwest corner and that is over there thirty-five or forty feet from the school house tract across the road. If there was a post oak tree called for at the Northeast corner, I fenced my corner there at that time. I ran South from there and fenced it up. The fence is partly there today. I have not looked at it. I have just passed the road and have not gotten out to examine it. The fences seemed to be like they were when I fenced it. I never knew of anyone claiming that two acres besides myself. I sold
235 it to R. M. Wood. The road has been graded and widened since then. It is considerably wider now than it used to be. At the time I went there and fenced it up there was a fence on the West side of the road. The lane ran up there on the West side of my tract and on the East side of the tract across the road and next to the school house. There was an old rail fence over on the West side and was apparently a good fence."

Re-Direct Examination.

By Counsel for Defendant:

"The deed to the two acre tract calls 'thence West 115 feet to the East side of the Union Grove Public Road with a black jack.' I fenced to the East side of the road. I never did claim anything except to the East side of the road as called for in the deed."

Re-Cross Examination.

By Counsel for Complainant:

"My fence at the Southwest corner of the 2 acre tract was about 35 feet from the fence across the road. The road was just an ordinary country road."

H. O. GOSSETT, a witness produced by defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendant:

"My name is H. O. Gossett and I live in Longview, Texas, and lived there in 1931. I took some pictures in about 1931 of the sprocket wheel. The pictures were taken just after the survey of the Empire lease. Those were the pictures I took. They represent the sprocket wheel as it was on the ground at that time. One
236 picture shows a man standing within one foot of the sprocket wheel. At the time I took the picture I followed the surveyor who measured from the red oak tree on the East line of the survey to the sprocket wheel. It was 880 yards. The surveyor was Horace Boyette."

J. E. SPORT, a witness produced by defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendants:

"My name is J. E. Sport and I live at Gladewater and have lived in Gregg County for forty-five years.

I owned at one time what is known as the Bouknight place, which joins the Wiley Davis place on the North. I knew that property out there from 1892 to the present.

In 1892 and the years following, I was acquainted with what was known as the Bozeman land and the Rogers land. I know where the post oak tree is at the Southeast corner of the M. O. Sheppard 36 acre tract. I know where the red oak tree is at the Northeast corner of the 36 acre tract.

Q. Extending that line on North to the Northeast corner of the Wiley Davis tract, at the Southeast corner of your tract, was there a tree at that point?

A. Yes. It was a pine tree. That pine tree represented the dividing line of the survey just like the oak tree did down South. I would judge that pine tree at the Southeast corner of my tract and at the Northeast corner of the Wiley Davis tract was 70 or 75 feet from the Mings fence as it was first fenced.

Q. The Mings fence as extending on South 23" about 70 or 75 feet from the pine tree, if it was extended on South, would it or not be close to where the old sprocket wheel is there?

A. Yes.

Q. Do you know where the sprocket wheel is?

A. Yes.

Counsel for Complainant:

We object to that as speculative, and not competent.

By the Court:

Q. "You are trying to say it was about on the line North and South with the sprocket wheel; that is your best judgment?

A. Yes.

I have known that sprocket wheel ever since I was over there. It has been there twenty-five or thirty years."

Q. What did it represent?

A. The dividing line of the Rogers subdivision.

Q. All right."

Counsel for Complainant:
"We object to that as a conclusion."

Counsel for Defendant:
"Q. I mean what is its reputation in that community there as to what it did represent?
A. It represented the dividing line between the Rogers subdivision."

Counsel for Complainant:
"We make the same objection."

The Court:
"Overuled."

238 Counsel for Complainant:
We except."

Cross Examination.

By Counsel for Complainant:
"I know where the school house was at the Northeast corner of the Wiley Davis tract. The school house was South of the pine tree. The school house did not go approximately where the pine tree was. A road came in there. At that time the road was between the tree and the school lot but the road was widened of course afterwards. The road made a little round turn and not an exact square turn. If the road had gone on up East of the Wiley Davis tract and made a square turn it would have gone South of the pine tree. The pine tree was North of the line and North of the School house line. The school house line was in the extreme Northeast corner of the Wiley Davis tract. The pine tree was in the joint line between the Hayden Edwards survey on the North and the Thomason Survey on the South. The school tract was not surveyed up to the Edwards tract on the North on account of the road which made a little bend there. I helped put the road there. The fences must

have been at least sixty or seventy feet apart but the road did not take up all the land, however. The road was cut out twenty-five, thirty or forty feet wide. It did not go plumb straight when it was originally cut out. Davis' fence was back ten, fifteen or twenty feet from the West line of the road. The road was fenced on the East when Mr. Mings bought and put in the orchard there. I do not remember when the road was fenced South of the Mings place. It has been quite a long while. The road has been recently widened. In 1935, the fences that were there were further than thirty-five
239 or forty feet apart. I put up the school house fence myself. A fence was put up from the Mings tract on the South to the Gladewater Highway. I do not remember the date it was built.

Wiley Davis had a fence on the West side of the road running clear up to the school house lot. I do not think, in 1930, before the road was widened, Davis and Rogers' fences were within forty-five feet of each other. I did not measure them. I was road overseer and people went over the road. In my judgment they were sixty or seventy feet apart. After the fences were put there the road was widened. I will say that the fences were at least sixty feet apart. I know where the Mings fence is on the East side. That is the part that remains and I do not think it has ever been changed.

There is a marked post oak tree at the Northeast corner of the Mings tract. It is the Northeast corner tract of the Mings 2 acre tract. We measured the distance from that tree on back West 147 feet. The 147 feet did not run out in the road as it was originally built. I do not know whether the fence at the Northwest corner of the Mings tract is now where it was originally built. By taking the Northeast corner of the Mings tract and measuring back 147 feet, the Northwest corner of the Mings tract would be found as it was originally located. The road did not run back to the Southeast as it does now. Originally, it started up where it is now and ran what I call to the South. It bears back a little to the Southeast

down about the Southeast corner where the fence is and that is not the way it originally ran. It now bends back a little to the Southeast. The road bends back very little to the Southeast from where it used to
240 run South. I never heard of Doc, Flavius and John Rogers claiming any strip along the West side of the tract. As far as I know J. F. Rogers and his family owned all of that Northwest tract up there to the road. I think it was theirs. That was always called Frank Rogers place.

I first heard of the gear wheel down there about twenty or twenty-five years ago. I did not put it there and do not know exactly when it was put there. All I know about it is that I went along there and saw it. It was almost in the road. The road wobbled quite a little bit.

The road did not originally run up against the Haynes fence because a heavy row of timbers had grown up in the old fence row. I know where the fence is now. I have not been over it in six, eight or ten months and do not know whether there are deep ruts along next to the fence. There was a sort of bad place there though.

The Rogers fence at that point was not straight. I do not think there was any bend in the fence. It ran just straight on by the gear wheel to the corner. There used to be an angle bar put in the pike, in the South edge of the road. Pinkney Davis put it there about thirty years ago. The road always ran on down there and turned across East of Mr. Haynes place about midway of the Haynes line South of the Rogers tract. The road ran South. It ran South and turned to the West and ran across Haynes land. There was an old trail going on down South though. The old road came on down from the school house clear on down South, approximately half way between the J. F. Rogers Southwest corner and the M. O. Sheppard tract. The road then turned
241 Northwest across the Haynes tract. There was always a big road there at the King tract. It was quite a distance from Haynes fence to King's fence.

There was not any fence on Haynes side after you turned South. There was a fence on the East.

I was with one of the surveyors when they made a survey. I was not with the surveyors when they set the gear wheel. I was with the surveyors when they surveyed from the post oak corner to the red oak corner and from the red oak corner up to the well. That was about two years ago. I was just going along. The surveyor came and wanted me to show him the Southwest corner post oak tree at the Southeast corner of the Sheppard tract. That was the Southwest corner of the Rogers tract on the South. That was the Southwest corner of the J. W. Rogers and F. E. Rogers tract. The surveyor ran from there with me to the red oak tree at the Northeast corner of the Sheppard tract. We then ran on in the same direction to the gear wheel and we ran from there West to the fence. I did not check his course.

Q. I think it is admitted that a line running North from the red oak at the Northeast corner of the Sheppard tract would strike a considerable distance West of the gear wheel?

A. I don't know about that. We ran from the red oak to the gear wheel.

Q. It is your recollection that he ran a course North from there?

A. Yes.

242 Re-Direct Examination.

By Counsel for Defendants:

"I do not know whether that was Mr. Rest trying to get the relative location of the gear wheel with the trees. He just had me to go and point out the Southwest corner to him, which I did. He then went to the red oak and to the gear wheel."

Re-Cross Examination.

By Counsel for Complainant:

"As I understand it, the Wiley Davis Northeast corner and Mrs. L. J. Rogers Northwest corner was a common corner."

J. H. SIMMONS, a witness produced by the defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendants:

"My name is J. H. Simmons and I live in Dallas. I am looking after the Z. N. Simmons lease, which lies immediately South and West of the gear wheel.

At the time and before the well was drilled I took some pictures at the place. The picture you handed me is one showing myself standing close to the road before the location was made. The location for the well is between the King fence and the Haynes fence. Exhibit No. 40 shows the road that runs between those fences. Exhibit No. 41 shows a picture of the Haynes and King fences. In Exhibit No. 40, I am pointing at the location and am looking South. Exhibit No. 41 shows the Haynes fence to the West where the other gentleman is standing and I am standing at the King fence. Exhibit No. 42 is a picture showing the road running North and
243 then swinging over to the East side of the fence. That is a portion of the same road going toward the North. The picture shows the Haynes house on the left and the Rogers fence through the timber on the right."

By the Court:

"Now, the picture No. 41. Where were you standing on the ground when you took that picture?

A. I was standing on the King West line with my hand on that fence line.

Counsel for Complainant:

"We object to that as a conclusion.

The Court:

"But the fence line is what he said. On the West line of the King tract."

By the Court:

"The fence line continues on down about 100 or 150 feet and corners at the bevel gear. This fence ran North and it ran down here about 150 or 200 feet and then cornered at the bevel gear and then ran East."

By the Court:

"Was there a fence going North from the bevel gear?

A. No, sir."

Q. That is the Haynes fence on your left there, is it not?

A. Across the way. This is the Haynes fence on the West.

By the Court:

"Where is the road, with reference to those two right East of the Haynes fence?

A. Right where I am standing. It is sort of cut away. It is down there; and right immediatly to my
244 West is the road here; and it goes North."

(Cross Examination.)

By Counsel for Complainant:

"There is also a red oak over next to the Haynes fence West of me. There are a number of old roads there but this is the oldest one. They seem to be about the same. They sort of go back and forth. The road is traveled one place one time and another place another time."

(Direct Examination Resumed.)

By Counsel for Defendants:

"On the left hand side of Exhibit No. 42 is the Haynes fence. The fence travels on North and swings to the road where it corners at the bevel gear, I presume about three or four feet East of the corner and then it swings right around it. I did not take a picture going North from the bevel gear. There was a house there with a front yard and I do not believe they had a fence there. On North of the bevel gear there was no fence. If I remember it, there was an old fence there but it was not kept up like this one South of the bevel gear. In Exhibit No. 42 the old road depicted wound around to the place of least resistance through the timber. Exhibit No. 41 shows the well South and West of the gear wheel and at the place I am pointing is the continuation of the original road South. Extending the road on North on the lease that Z. N. Simmons has would be an extension of the road on to the lease that Dunlap has.

Cross Examination.

By Counsel for Complainant:

"I am not a lawyer. I am the Simmons that went down to take the deposition of Mr. Rogers. My well is located at the place shown on the map and is between the fences.

They built the fence rows pretty straight and
245 then began putting the fences on the trees. The fence bears back to the West. The fence goes over West of the line running South from my well after the fence gets in the wooded section. The Haynes fence is straight along to the West. I did not pay much attention to the North of my well and North of the bevel gear. I do not think the fences left a wider place from the bevel gear West to the Haynes line than they did anywhere else because within about 100 feet of the highway is the warehouse and immediately behind the warehouse you

can see the remains of an old fence now that looks to be about where the bevel gear is. The warehouse is about midway between the bevel gear and the highway, the distance between the bevel gear and the highway being about 1500 to 2000 feet. I never saw the old wire in the trees running to the Northwest from the bevel gear. I never did see the old wires in the trees running North from the bevel gear where the fence left the bevel gear and angled off back toward the Northwest. The fence on the left of the picture taken looking North (being Exhibit No. 42) is the Haynes fence. The road is the one between the Haynes and King fences. The King fence would be still further over to the right of the picture and is not shown."

Counsel for Defendants:

"We offer in evidence EXHIBITS 38, 38-A, 39, 40, 41 and 42, being pictures."

The Court:

"The exhibits are admitted in evidence, and are found at the end of this statement of the evidence."

246 Re-Cross Examination.

By Counsel for Complainant:

"Exhibit No. 40 is looking South and I am pointing with my left hand to the location of my well. The Haynes fence is to the right of the picture. The point I am pointing at with my left hand is about 35 or 40 feet from the Haynes fence. The roads meander back and forth in between those trees and at the exact spot I do not know whether there is any road or not. The road would wash on one side and then they would get on the other side."

Counsel for Defendants:

"We offer in evidence as EXHIBIT No. 43, oil and gas lease from F. E. Rogers, et al., to B. P. Dunlap.

The Court:

"The exhibit is admitted in evidence and is as follows:

"Oil, Gas and Mineral Lease:

F. E. Rogers, et al., & B. P. Dunlap.

Dated: October 10, 1934.

Filed: October 19, 1934, 1:57 PM.

Recorded: Vol 170, page 602, Deed Records, Gregg County, Texas. File #9668.

This Agreement, made this 10th day of October, 1934, between F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, widow of J. F. Rogers, deceased, J. E. Rogers, joined by his wife, Ola Mae Rogers, Elvie (Rogers) Waskom, having been abandoned by her husband, Azzie Waskom, Lessor (whether one or more) and B. P. Dunlap, of 4412 Lakeside, Dallas, Texas, Lessee, Witnesseth:

1. Lessor in consideration of other considerations and ten dollars ($10.00) in hand paid, of the royalties herein provided, and of the agreements of lessee herein contained, hereby grants, leases and lets exclusively unto lessee for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and other minerals, laying pipe lines, building
247 tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, transport and own said products, and housing its employees, the following described land in Gregg County, Texas, to-wit:

Being all that certain lot, tract and parcel of land in Gregg County, State of Texas, in the Geo. A. Thomason Headright Survey, lying West of the West Bounary line of the J. F. Rogers tract of land as surveyed in the year

1899, and East of the West boundary line of the Alexander Rogers tract of land established in or about the year 1855, which line is also the East boundary line of the G. W. Clark and M. P. Haynes tracts of land, this lot, tract and parcel of land being more particularly described as follows, to-wit:

Beginning at an old steel shaft about 2" in diameter with an old bevel gear wheel on upper end, as a land mark stake set for the W. N-W. corner of a 176 acre tract of land and the S-W. corner of the J. F. Rogers tract of land by the surveyor on the ground in the year 1899;

Thence Northerly along the W. B. line of said J. F. Rogers tract of land to the N-W. corner thereof on the N. B. line of the said headright survey a distance of about 880 yards;

Thence West 66.89 feet to the N-E. corner of the Clark land which is also the N-W. corner of the Alexander Rogers original tract of land prior to the junior surveys thereof made in the year 1899;

Thence Southerly 880 yards along the East boundary lines of the Clark land and the Haynes land, which is also the West boundary line of the said Alexander Rogers land, to a $1\frac{1}{4}$" iron pipe stake set in the West boundary line of the said Alexander Rogers tract of land, the same being the S-W. corner of this tract;

Thence East 66.89 feet to the place of beginning and containing five (5) acres of land, more or less.

Save and Except about 2 acres of land conveyed to J. W. Mings by Mrs. L. J. Rogers, et al., by deed dated May 7, 1917, and recorded in Vol. 32, page 564, Deed Records of Gregg County, Texas.

2. Subject to the other provisions herein contained, this lease shall be for a term of ten years from this date (called "Primary term") and as long thereafter as oil, gas or other mineral is produced from said land hereunder.

3. The royalties to be paid Lessor are: (a) on oil, one-eighth of that produced and saved from said land, the same to be delivered at the wells or to the credit of Lessor into the pipe line to which the wells may be connected; Lessee may from time to time purchase any royalty oil in its possession, paying the market price therefor prevailing for the field where produced on the date of purchase; (b) on gas, including casinghead gas or other gaseous substance, produced from said
248 land and sold or used off the premises or in the manufacture of gasoline or other product therefrom, the market value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale; where gas from a well producing gas only is not sold or used. Lessee may pay as royalty $50.00 per well per year and upon such payment it will be considered that gas is being produced within the meaning of paragraph 2 hereof; and (c) all other minerals mined and marketed, one-tenth either in kind or value at the well or mine, at Lessee's election, except that on sulphur the royalty shall be fifty cents (50c) per long ton. Lessee shall have free use of oil, gas, coal, wood and water from said land, except water from Lessor's wells, for all operations hereunder, and the royalty on oil, gas and coal shall be computed after deducting any so used. Lessor shall have the privilege at his risk and expense of using gas from any gas well on said land for stoves and inside lights in the principal dwelling thereon out of any surplus gas not needed for operations hereunder.

(4) If operations for drilling are not commenced on said land on or before one year from this date the lease

shall then terminate as to both parties unless on or before such anniversary date, Lessee shall pay or tender to Lessor or to the credit of Lessor in The First National Bank at Longview, Texas, (which bank and its successors are Lessor's agent and shall continue as the depository for all rentals payable hereunder regardless of changes in ownership of said land or the rentals) the sum of Five Dollars ($5.00) (herein called rental) which shall cover the privilege of deferring commencement of drilling operations for a period of twelve (12) months. In like manner and upon like payments or tenders annually the commencement of drilling operations may be further deferred for successive periods of twelve (12) months each during the primary term. The payment or tender of rental may be made by the check or draft of Lessee mailed or delivered to said bank on or before such date of payment. If such bank (or any successor bank) should fail, liquidate or be succeeded by another bank, or for any reason fail or refuse to accept rental, Lessee shall not be held in default for failure to make such payment or tender of rental until thirty (30) days after Lessor shall deliver to Lessee a proper recordable instrument, naming another bank as agent to receive such payments or tenders. The down cash payment is consideration for this lease according to its terms and shall not be allocated as mere rental for a period. Lessee may at any time execute and deliver to Lessor or to the depository above named or place of record a release or releases covering any portion or portions of the above described premises and thereby surrender this lease as to such portion or portions and be relieved of all obligations as to
249 the acreage surrendered, and thereafter the rentals payable hereunder shall be reduced in the proportion that the acreage covered hereby is reduced by said release or releases.

In this connection the above described premises shall be treated as comprising five acres, whether there be more or less.

5. If prior to discovery of oil or gas on said land Lessee should drill a dry hole or holes thereon, or if after discovery of oil or gas the production thereof should cease from any cause, this lease shall not terminate if Lessee commences additional drilling or reworking operations within sixty (60) days thereafter or (if it be within the primary term) commences or resumes the payment or tender of rentals on or before the rental paying date next ensuing after the expiration of three months from date of completion of dry hole or cessation of production. If at the expiration of the primary term oil, gas or other minerals is not being produced on said land but lessee is then engaged in drilling or reworking operations thereon, the lease shall remain in force so long as operations are prosecuted with no cessation of more than thirty (30) consecutive days, and if they result in the production of oil, gas or other minerals so long thereafter as oil, gas or other mineral is produced from said land. In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within one hundred fifty (150) feet of and draining the leased premises, Lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances.

6. Lessee shall have the right at any time during or after the expiration of this lease to remove all property and fixtures placed by Lessee on said land, including the right to draw and remove all casing. When required by Lessor, Lessee will bury all pipe lines below ordinary plow depth and no well shall be drilled within two hundred (200) feet of any residence or barn now on said land without Lessor's consent.

7. The rights of either party hereunder may be assigned in whole or in part and the provisions hereof shall extend to the heirs, successors and assigns, but no change or divisions in ownership of the land, rentals or royalties however accomplished, shall operate to enlarge the obliga-

tions or diminish the rights of Lessee. No sale or assignment by Lessor shall be binding on Lessee until Lessee shall be furnished with a certified copy of recorded instrument evidencing same. In event of assignment of this lease as to a segregated portion of said land, the rentals payable hereunder shall be apportionable as between the several leasehold owners ratably according to the surface area of each and default in rental payment by one shall not affect the rights of other leasehold owners hereunder. If six or more parties become
250 entitled to royalty hereunder, Lessee may withhold payment thereof unless and until furnished with a recordable instrument executed by all such parties designating an agent to receive payment for all.

8. The breach by Lessee of any obligation arising hereunder shall not work a forfeiture or termination of this lease nor cause a termination or reversion of the estate, hereby nor be grounds for cancellation hereof, in whole or in part, save as herein expressly provided. If the obligation for reasonable development should require the drilling of a well or wells, Lessee shall have ninety (90) days after ultimate judicial ascertainment of the existence of such obligation within which to begin the drilling of a well, and the only penalty for failure to do so shall be the termination of this lease save as to ten (10) acres for each well being worked on and/or being drilled and/or producing oil or gas to be selected by Lessee so that each 10 acre tract will embrance one such well.

9. Lessor hereby warrants and agrees to defend the title to said land and agrees that Lessee at its option may discharge any tax, mortgage or other lien upon said land and in event Lessee does so, it shall be subrogated to such lien with the right to enforce same and apply rentals and royalties accruing hereunder toward satisfying same. Without impairment of Lessee's rights under the warranty in event of failure of title, it is agreed that if

Lessor owns an interest in said land less than the entire fee simple estate, then the royalties and rentals to be paid Lessor shall be reduced proportionately.

10. Lessee hereby by acceptance of this lease, agrees, binds and obligates himself to pay all costs and expenses in defending the title and to hold Lessors harmless and free of any costs and expense in this connection.

11. As a further consideration for this lease, Lessee, his successors and/or assigns, hereby assign, promise and agree to pay to Lessors, their heirs or assigns, from the proceeds of one-eighth (1/8th) of the seven-eighths (7/8ths) working interest, of each oil well made and completed on the above described land, the sum of twenty-five hundred ($2500.00) dollars, free of all operating costs and expenses, which shall be payable only if, as and when such oil well and/or wells have been made and such oil shall be produced, saved and marketed from said wells, and at the market price and or prices as may be obtained by Lessee for such oil from time to time and until this part of the consideration shall be paid, after which payment the said one-eighth working interest shall revert to and become the property of Lessee, his successors and/or assigns under the other terms and conditions of this lease.

251 In Witness Whereof, this instrument is executed on the date first above written.

F. E. ROGERS,
her
MRS. L. J. X Rogers,
mark
J. E. ROGERS,
ELVIE ROGERS WASKOM,
OLA MAE ROGERS,
W. H. ROGERS.

Witnesses:
JAS. L. LANTZ,
As to mark of Mrs. L. J. Rogers."

(Acknowledgments.)

Counsel for Defendants:
"We offer in evidence a boundary line agreement between B. F. Phillips and others, being EXHIBIT No. 44."

Counsel for Complainant:
"We object to the introduction of the exhibit for the reason that it is irrelevant and immaterial."

The Court:
"Objection overruled."

Counsel for Complainant:
"We except."

The Court:
"The exhibit is admitted and is as follows:

"Boundary Line Agreement,

"B. F. Phillips, et al., to Each Other.

Dated: Mch. 8, 1935.

Filed: Nov. 22, 1935.

Recorded in Vol. 192, page 150, Deed Records of Gregg County, Texas. File No. 12,091.

The State of Texas,
County of Gregg.

Whereas, B. F. Phillips, of Gladewater, Gregg County, Texas, is the assignee of a certain oil and gas lease executed by J. R. Bozeman and wife, to J. T.
252 Brewer, covering certain land in the G. A. Thomason Survey, Gregg County, Texas, said assignment being of record in Book 174, page 57, of the Deed Records of Gregg County, Texas; and

Whereas, said B. F. Phillips has secured certain quitclaim deeds covering the east half of the said Thomason Survey from the Moseley Heirs, as appear of record from some eighteen such quitclaim deeds; and,

Whereas, Z. M. Simmons, B. P. Dunlap and Swiss Oil Corporation, hold of record oil and gas leases covering land lying immediately east and adjacent to the land covered by the said Brewer lease, and since there may be some confusion with respect to the respective leases and on account of the said quitclaim deeds, the parties have agreed, and do now agree on a boundary line between them, the said B. F. Phillips and L. F. Burke agreeing that they do not claim, as against the other said named parties, Z. M. Simmons, B. P. Dunlap, Swiss Oil Corporation, H. O. Gossett, F. E. Rogers and wife, Rose Rogers, any mineral leasehold interest east of said line, and the said Z. M. Simmons, B. P. Dunlap, Swiss Oil Corporation, H. O. Gossett, F. E. Rogers and wife, Rose Rogers, agreeing that they, nor any of them, claim any mineral leasehold interest west of said line, said line being as follows:

Beginning at a point 66.89 feet west of the old gear wheel driven in ground for the N. W. corner of A. N. King tract, and N. E. corner of Z. M. Simmons, said gear wheel being 880 yards (2640 feet) west of the east line of the Thomason Survey;

Thence North to the Longview-Gladewater Highway, and continuing on North to North line of said G. A. Thomson survey.

Also starting at same point, 66.89 feet West of said old gear wheel;

Thence South to South line of said G. A. Thomason survey.

Phillips now has a well on the Brewer lease, West of this line, and Simmons one East thereof, and neither claims any interest in the well of the other.

This agreement shall run to and be binding upon the parties hereto, their heirs, successors and assigns, but shall not inure to the benefit of any other person or operate against any party hereto, except as between themselves, their heirs, successors and assigns.

Witness our hands this the 8th day of March, A. D. 1933.

B. F. PHILLIPS,
253 L. F. BURKE,
F. E. ROGERS,
MRS. ROSE ROGERS,
B. P. DUNLAP,
H. O. GOSSETT,
Z. M. SIMMONS,
By JAY SIMMONS,
Attorney in Fact.
SWISS OIL CORPORATION,
By JAY SIMMONS, President.

Attest:
O. J. DICKINSON, Secretary. (Corp. Seal)."

(Acknowledgments.)

J. E. ROGERS, a witness produced by defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Defendants:

"My name is J. E. Rogers and I am known as Dink Rogers and the son of J. F. Rogers. My mother's name is Pearlie Rogers and she is living.

I remember something about the partition when it was made in 1899. My first recollection of the matter occurred

in 1905. I had occasion to go to the Southwest corner of my mother's tract at that time with Seth Davis.

Q. What was at the corner there, marking it?

Counsel for Complainant:
"We make the same objection. It is immaterial and irrelevant, and not called for in the field notes."

254 The Court:
"Overruled."

Counsel for Complainant:
"We except."

(Direct Examination Resumed.)

By Counsel for Defendants:
"A pine knot or a stake was at the corner when I got there. An old gear wheel was placed at the same place where the pine knot or stake was. Seth Davis was with me when it was placed there.

Q. At that time, and since that time, and throughout your knowledge and recollection of that, tell at what point, you have understood the Southwest corner of your 68 acre tract to be, as partitioned in the partition?
A. The gear wheel."

Counsel for Complainant:
"We object to that as immaterial and irrelevant, and in contravention of that deed."

The Court:
"Overruled."

Counsel for Complainant:
"We except. And may we have the same general exception and objection?

The Court:

"Yes."

(Direct Examination Resumed.)

By Counsel for Defendants:

"I am the J. E. Rogers who signed the lease to Mr. Chandler. I saw the surveyor sometime thereafter out on the tract of land. I saw him when he had started the survey and before he completed it. He said he
255 was going to survey out the lease to the Empire Gas & Fuel Company. I could not say where he was when I first saw him. I thereafter went to the gear wheel with him. When we got there he asked me what the gear wheel represented and I told him it was the Southwest corner of our tract. I told him that that was the corner in the partition and that West of there is where the East line used to run. When I told him the gear wheel represented the corner in the partition he did not say anything about it.

At that time there was no iron stake at the Northeast corner of our tract. There had been an iron stake there up until about 1924, when I drug it down with a log wagon. I was working for Collie Magrill, driving a log team and the wagon had eight wheels. It was low and the pipe was sticking up high and I pulled it down with the log wagon the first trip I went over it. There has not been an iron stake there until the time the Empire drove that stake there.

Later on, Mr. Cox came to me with a ratification instrument. He told me that it included the same land the Chandler lease had. I found out that it included more land than the Chandler lease and, after I found it out I said something to Mr. Cox about it in front of the filling station that I was operating at that time.

Q. What did he say about it?

A. He said he was working for the company.

Q. He said he was working for the company, and you would have to blame them?

A. Yes.

256 Counsel for Complainant:

"We object to that as immaterial, and irrelevant, and incompetent, talking with an agent, and all the transaction was past."

The Court:

"I doubt the materiality of that. Go ahead."

(Direct Examination Resumed.)

By Counsel for Defendants:

"The Dunlap lease is signed by F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers and his wife, and Elvie Waskom and they are the only heirs of Alexander Rogers, my grandfather."

Cross Examination.

By Counsel for Complainant:

"My uncle is W. H. or Doc Rogers. F. E. Rogers is Flavius Rogers; J. W. Rogers was John Rogers and he is dead. My father died in 1899.

I am forty-one years old. I went out with Seth Davis to the gear wheel in 1905 and I was about nine years old and Seth was about twenty-five years older than I was. There were some marked trees down where we put the gear wheel, along about that line. I do not know where they stood. They have disappeared long ago. The fence from our most Northerly Southeast corner up to the North line has stood there since about 1920. I put it there and it has stood where I put it ever since then. I ran the fence through by guess. I did not know whether it was right. I knew it was somewhere in the neighborhood of right. I did not intend to put it on my line. I wanted to put it West of the line about five or six feet. I knew Akin was claiming East of our land. The fence, in a general way was the line between our land and the Akin land. Akin never fenced the land along there. I kept

the fences up. I do not know anything about
227 when Doc Rogers deeded the tract away and the
12 varas excess. I did not see it measured out. When he sold that land I was very small. There had never been a fence along there until I fenced it.

I do not know when the iron stake or bolt was put there that is in the road now with the pipe driven around it. It has been there a few years. I showed that to Ben Ramsey and Ben Leuty. I told them where it was standing but there was no pipe there when the engineers came by. I showed him where it should be. I did not show him an iron stake or bolt on that corner. I did not put a pipe around the bolt I showed him. I just walked out there about where it was. I knew about where the corner was or where it should have been. I went up North of where the fence was, maybe ten feet. The fence was running South of me, right South from where I showed him the corner.

I did not show him the Northwest corner over here by the Mings tract. There was no corner established. There was a witness tree there but I did not figure that for a corner. The oak was not the corner. It witnessed the corner but there was no corner there. The post oak was there and marked and it is there yet. I knew I could go back away from the post oak the proper direction and distance and set the corner. The fence was right where the old remains of it is now. There are just a few bushes grown up there. There might have been one or two wires there but I could not say whether they were on the line or anything like that. The fence was put there by Jim Mings and myself.

The surveyors I think ran East of the post oak. They ran down around the fence, along the fence. When they
got down to the Southeast corner I showed them
258 that corner. There was an old pipe driven there.
That pipe marked my corner and I showed them a tree out here on the edge of the road. The pipe was in the edge of the road.

Q. The Mings line. You have heard the field notes read?

A. I did not tell them anything about that, for there was no corner out there. I could not tell them where it was at."

Counsel for Defendants:

"We object, because the field notes call for the corner to be inside the fence."

(Cross Examination Resumed.)

By Counsel for Complainant:

"I knew there was a tree there. I do not know whether it was a bearing tree for the corner. I was not out there when the two acres were surveyed out. My old fence ran down along the East side of the road going South.

I remember when the land was sold to Wood in 1917. It is 1919.14 feet from the Southeast corner of the Mings tract out in the road as it is shown on Exhibit No. 16, down to the point West of the bevel gear.

I did not tell them that my corner was out 66 feet West of the bevel gear. I did not see them establish the corner there. I went with them on Sunday and the next morning I was not with them. They were out one afternoon and the next morning. I do not know whether they came back the next day or the next week. I found where they had put a pipe and marked some trees out West of the bevel gear. I went with them over to point E on Exhibit No. 14, at our line over there. There was no corner right there. There was a fence that ran
259 down through there and the fence also ran up Northeast to the highway. There was a fence North of the highway and a fence back over to the Southeast corner. That is now owned by King. That is East of our land. Mr. Akin is in the Northeast corner. Akin and King both own East of our land. I showed them where our corner at D was on Exhibit No. 14. There

was an old fence that I showed them that was not quite on the line as shown on Exhibit No. 16. I showed them the most Northerly Southeast corner. There is an old bolt driven there in a fence corner. The fence ran from point C on Exhibit No. 16, on up to point D, just as shown on the exhibit. The fence had been there a good long time. The old Rogers homestead set up around point D on Exhibit No. 14. It was North of the road but midway of our most Northerly and South lines.

I do not know Mr. Harrison, of the Shell Petroleum Company, and I did not point out to him the corner."

Re-Direct Examination.

By Counsel for Defendants:

"As soon as I found out they had marked the trees on the West part over there next to the Haynes line, my sister and I took the matter up with Judge Gossett and he had the survey made and the pictures taken."

Counsel for Defendants:

"Defendants rest."

Counsel for Complainant:

"We want to recall F. E. Rogers."

F. E. ROGERS, being recalled, testified as follows:

260 Direct Examination.

By Counsel for Complainant:

"My name is F. E. Rogers and I testified yesterday that I went around as one of the parties with Mr. Simmons when he made the survey. When he went West from the Southeast corner on the East line of the Thomason survey 880 yards where I said he set the stake and the bevel gear is now driven, he did not mark any trees. There

were just little saplings there; he put down a stake and did not mark any trees.

R. M. WOOD, a witness produced by complainant, having been first duly sworn, testified as follows:

Direct Examination.

By Counsel for Complainant:

"My name is R. M. Wood and I am sometimes called Bob Wood. I live at Gladewater and have lived there for fifty-two years. I am in the real estate business. I have been engaged in the real estate business since 1912. My wife's mother was a Victory. I know J. W. Mings and I know the Rogers and G. W. Clark. I knew Wiley Davis. I first heard of this case at nine o'clock this morning. Mr. Harry Cowing came to my office. He is counsel for the Empire Company. I had not heard of him before then. He wanted to know if I had owned a certain two acre tract of land down there and I told him I had. I know where the Haynes land is. I sold Haynes that land. I did not know B. M. Bozeman but I knew all of his boys and girls. I know where the G. W. Clark or Wiley Davis land is. There is a road running North from the highway between the Davis land and the Rogers land. I know both tracts. I have had something to do with both
261 tracts.

In 1917 I bought twenty-five acres of land from J. W. Mings out of the Northwest corner of the Northwest one-fourth less a two acre tract. I sold the Clark tract for J. R. Mings about 1915. I sold it to J. W. Clark. I once owned the two acres up in the Northwest corner of the J. F. Rogers land. I owned it I think in 1917. The two acres were fenced at that time. I was on the land. I was on the land to the East and West of the fence. The Clark or Davis land West was fenced except an acre out of the Northwest corner of the Clark tract which was known as the school house acre. The fence ran up to

that school house lot and then ran around it. I would say that the West fence of the Mings tract which I bought was about thirty or thirty-five feet East of the fence on the Clark tract across the road. The fence ran approximately North and South. The Davis or Clark fence was approximately North and South. The fence ran from my Southwest corner down South a little bit East. The fence ran along there. The fence on the East side of the road was right up on the side of the ditch. The road I think was about thirty-five feet wide.

I knew J. A. Simmons. He was County Surveyor. I first knew him in 1898. When I bought the two acres from J. W. Mings I got some old papers from Mings. Some of the papers were field notes of those tracts up there.

The Court:
"Was old man Simmons a pretty careful surveyor?"

"A. I could not say that he was. May I tell you something else, as to why I say that? He did a lot of surveying for my father in the old days; and I checked in behind him; and I would not call him an expert surveyor."

262 The Court:
"Did you get him to survey this piece?
"A. No, he was dead then."

(Direct Examination Resumed.)

By Counsel for Complainant:
"The three papers, Exhibits Nos. 45, 46 and 47, are the ones I took from Mr. Mings with the title papers. Exhibits Nos. 45 and 46 are in Mr. Simmons handwriting. I am pretty sure that No. 47 is also in his handwriting."

Counsel for Complainant:
"We offer Exhibits Nos. 45, 46 and 47 in evidence."

P. O. Call field notes- R. H. Rogers place.

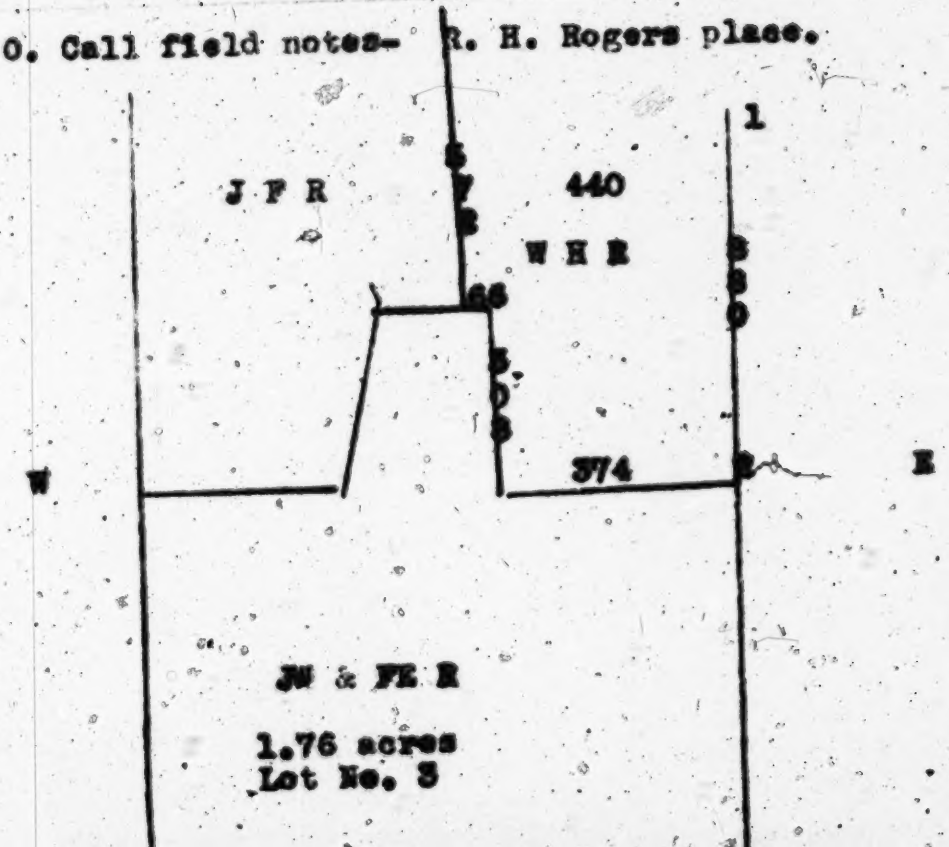
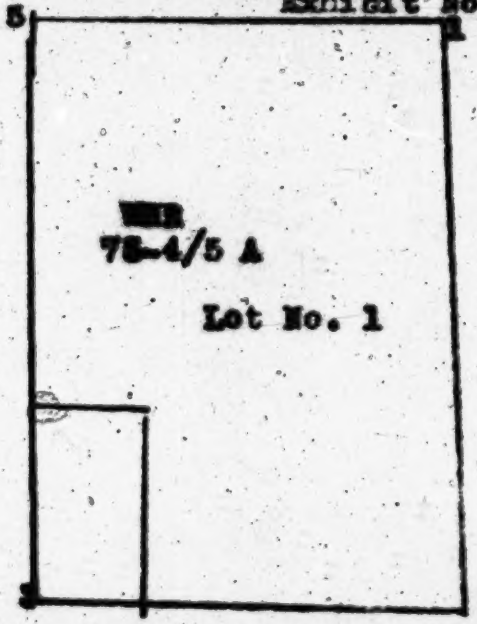


Exhibit No. 46.



Process verble of survey made the 23rd day of Feby.1899 for the Rogers Bro., starting at the NE corner of tract which is corner 1 as shown on plat above; running South 880 yards to corner 2 witness tree red oak S 69° E 10 links and pine N

154-

The Court:

"The exhibits are admitted and are as follows:

EXHIBIT No. 45.

"Process verble of Survey made the 23rd day of Feby., 1899, for Rogers Bro.

Starting at corner No. 2 which is the SEC of WHR tract witness trees red oake S. 69° E. 10 links and pine N. 43° W. 14 L. with cross on each tree;

Thence West 374 yards no witness trees given;

Thence North 308 yards, red oake S. 45° E. 4 L.;

Thence West 66 yards to JFR line pine S. 2° W, 27 L.;

Thence West 154 yards no witness trees given;

Thence South with about 12° West about 310 yards; no witness trees given;

Thence West 224 yards to corner 4—witness trees, pine S. 65° W. 6 L. and pines 80° E. 14 L.;

Thence South 880 yards to SWC of tract;

Thence East 880 yards to SEC of tract;

Thence North 880 yards to NEC of tract, the starting point—containing 176 acres for J W and F E R Lot No. 3, plated red.

I hereby certify the above is true and correct survey according to deeds.

This Feby. 24th, 1899.

J. H. SIMMONS, Surveyor.

264 43° W. 14 L. with cross on each tree; thence West 440 yards to corner 3 pine stump S. 7° E. 10 L. which is center of Rogers Tract; thence West 440 yards to corner 4 to Bozeman land pine S. 65° W. 6 L. and pine S. 80° E. 14 L. then come back to corner 3, center of tract and run North 880 yards to corner 5; pine N. 40° E. 5½ L. and pine S. 32° W. 11 L.; thence East 440 yards to starting point, containing 80 acres, which is Lot No. 1, less 4-1/5 acres off for J. W. and F. E. Rogers plated red.

I hereby certify the above is true and correct survey, according to deeds.

This Feby. 24th, 1899.

J. H. SIMMONS, Surveyor.

EXHIBIT No. 47.

State of Texas,
County of Gregg.
Know All Men by these Presents:

That I, J. F. Rogers, J. W. Rogers and F. E. Rogers, of the State and County aforesaid, for and in consideration of fifty dollars in hand, the receipt whereof is hereby acknowledged, do this day bargain, sell and convey, all interest in the following described tract or parcel of land, unto W. H. Rogers, of the same State and County, to-wit:

Starting at the NE. corner of the Rogers tract running South 880 yards; thence West 374 yards; thence North 308 yards; thence West 66 yards; thence North 572 yards; thence East 440 yards to starting point, containing 75-4/5 acres, more or less, with all the improvements thereon in the G. A. Thomason's Headright certificate, the title to said land I warrant and defend unto said W. H. Rogers, his heirs, assigns forever, binding myself, my heirs & assigns and legal representatives to the same in testimony whereof we hereunto sign our names in the presents of

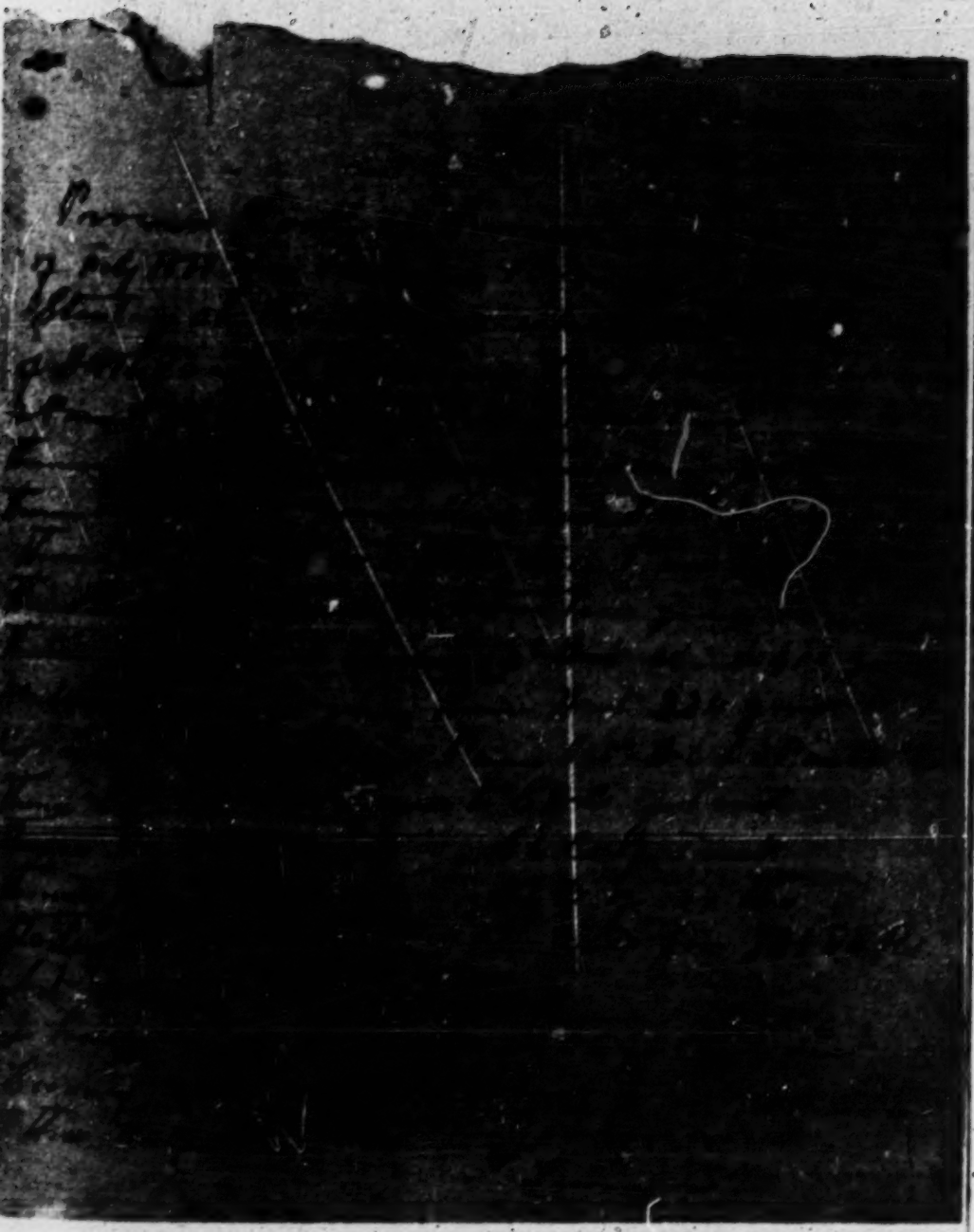
the attesting witnesses as Notary Public, on this the 28th day of Feby., A. D. 1899.

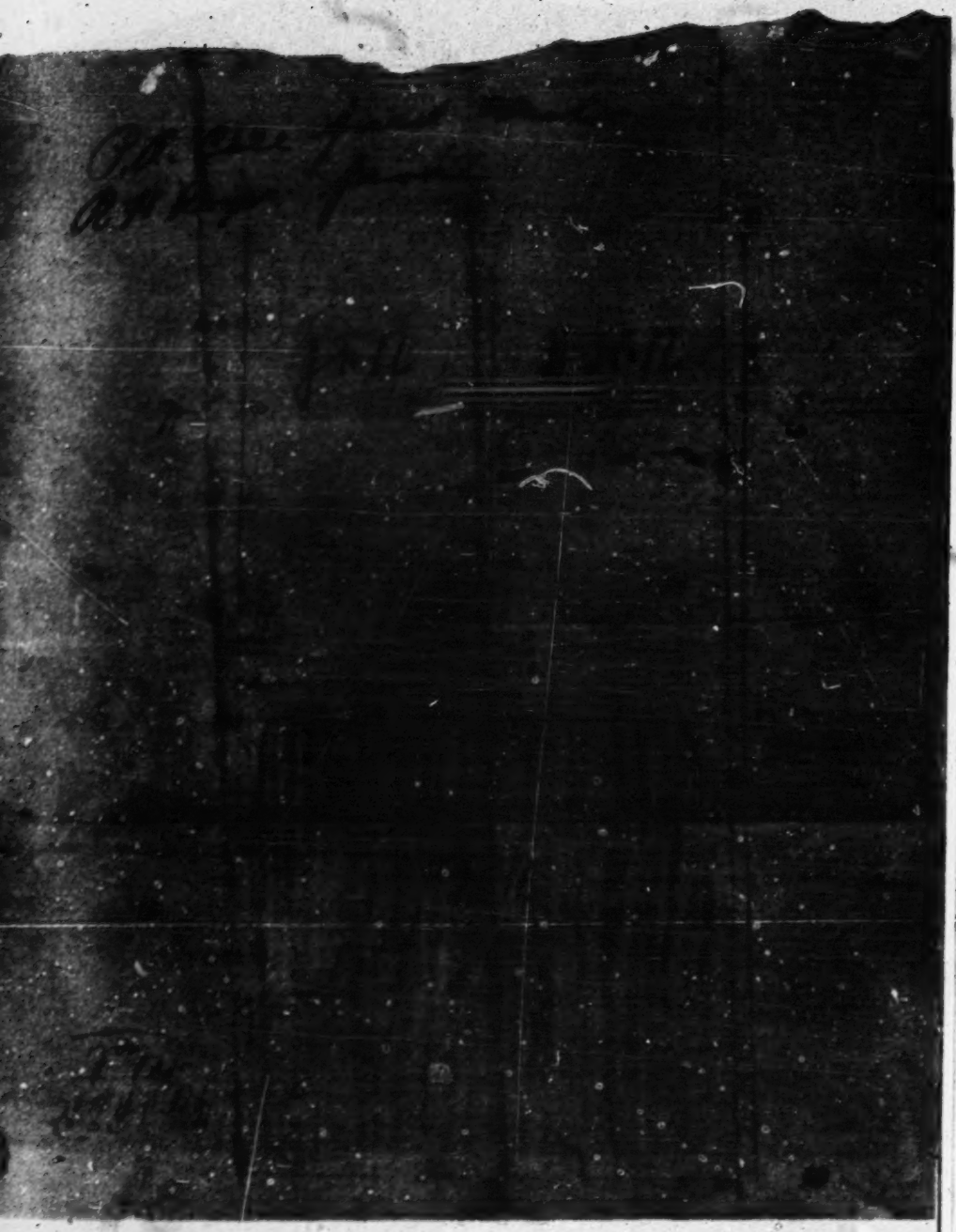
J. F. ROGERS,
F. E. ROGERS,
J. W. ROGERS.

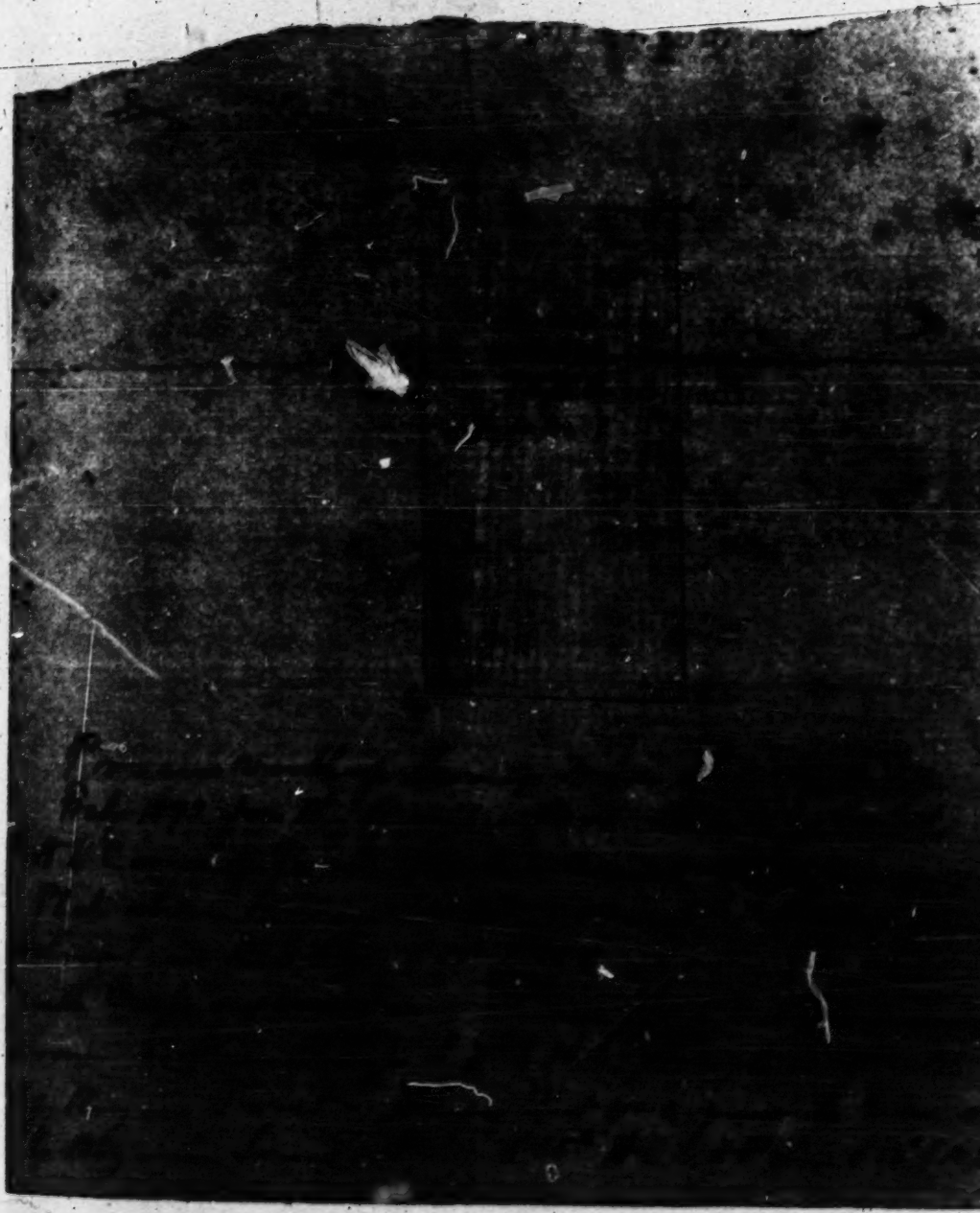
(Acknowledgment.)

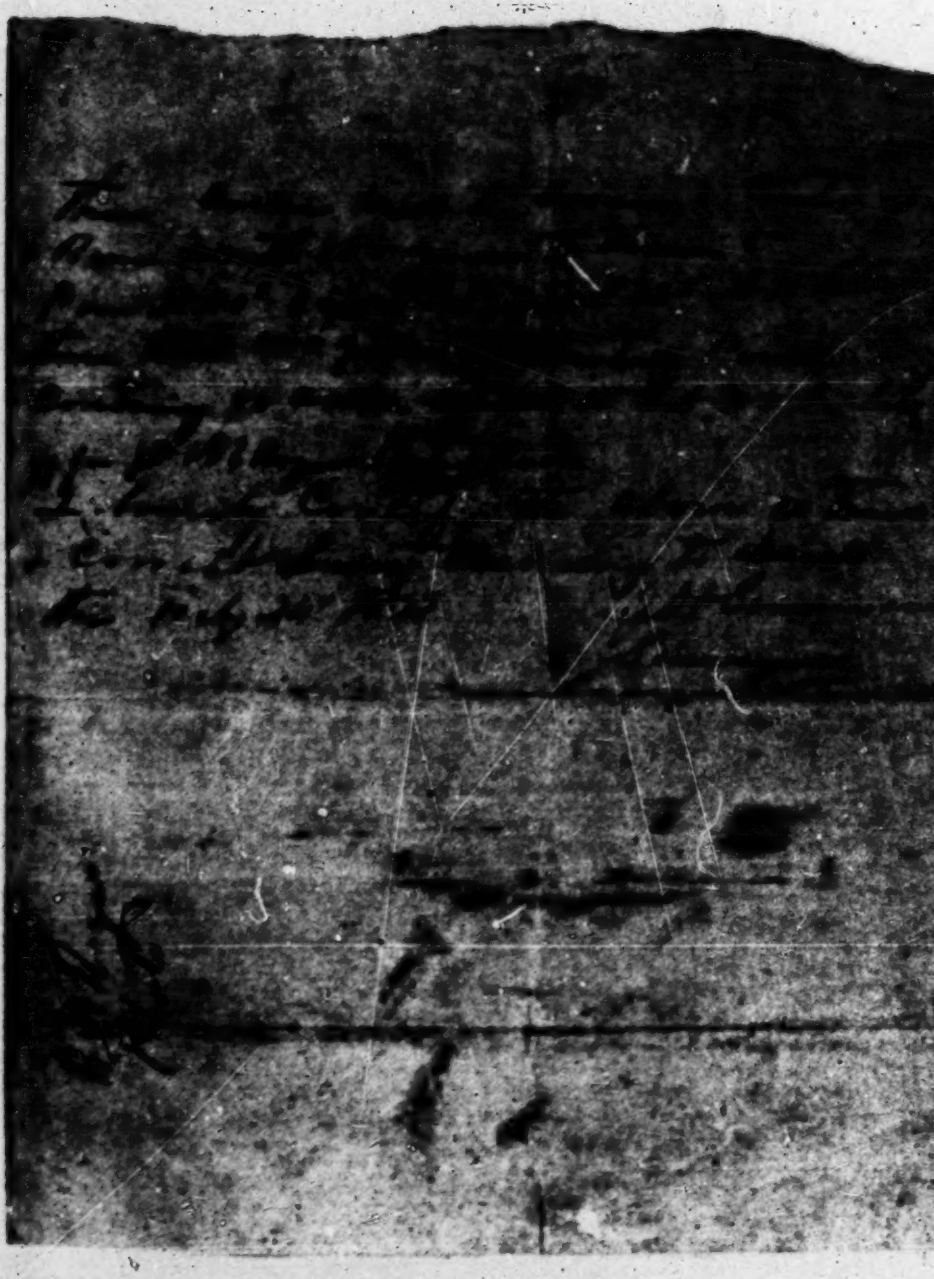
Filed for record July 10, 1915, at 10 o'clock a. m. Dush Shaw, Co. Clk., Gregg Co. Recorded in Book 29 on pages 559 & 60 at 9:30 o'clock a. m., August 5th, 1915."

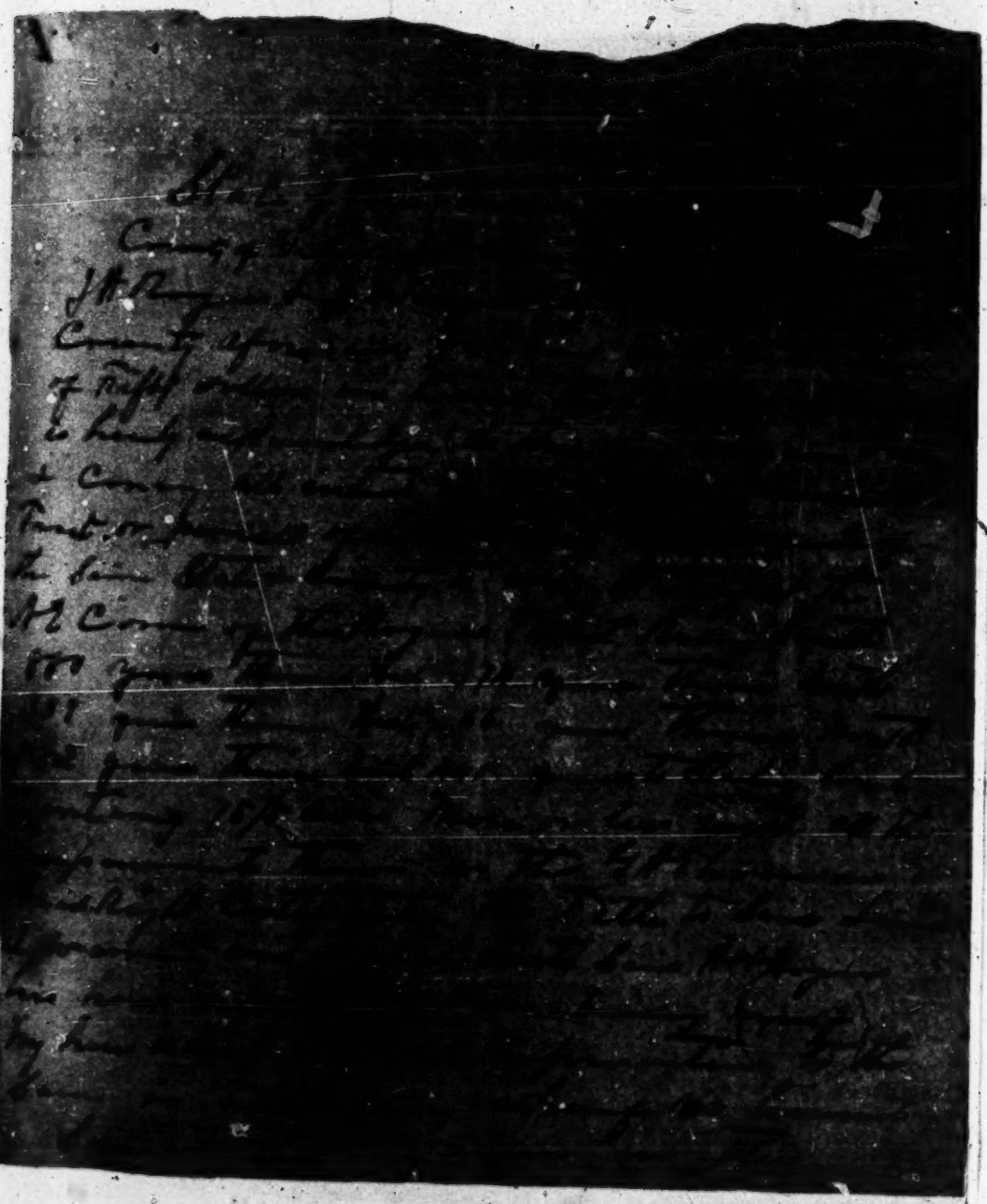
265 Upon request of Complainant that photostatic copies of Exhibits Nos. 45, 46 and 47 likewise accompany the record for the inspection of the Court, such request is granted and photostatic copies of these exhibits are as follows:

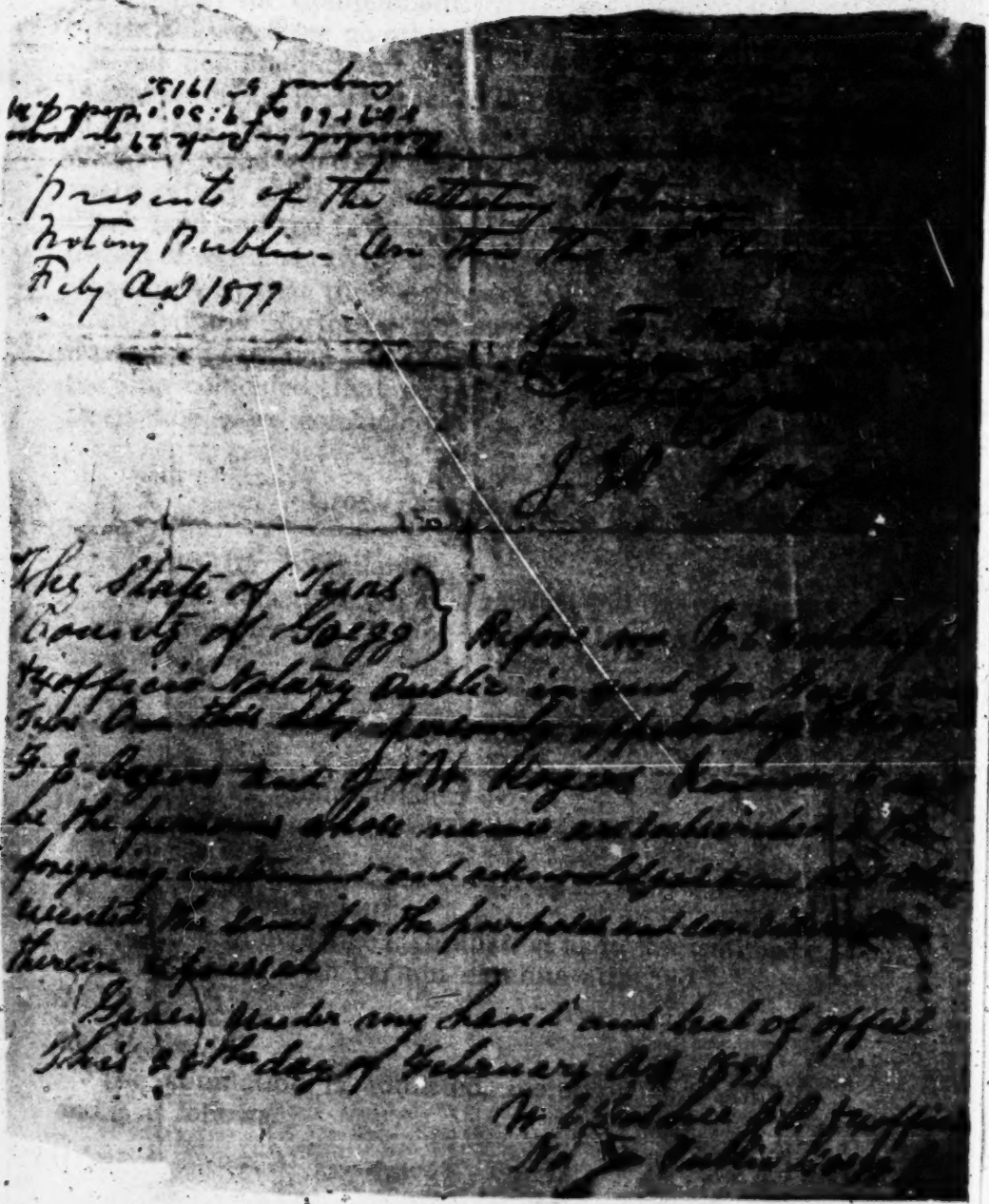












Present of the attesting
Notary Public on this the
Feby A.D. 1877

The State of Texas }
County of Gonzales } Before me [illegible]
[illegible] Notary Public in and for Gonzales
Texas On this day personally appeared [illegible]
[illegible] Regan and [illegible] known to
me to be the persons whose names are subscribed to the
foregoing instrument and acknowledged to me that they
executed the same for the purposes and consideration
therein expressed

Given under my hand and seal of office
This 24th day of February A.D. 1877

[illegible] Lee [illegible]
[illegible] Gonzales County

272 (Direct Examination Resumed.)

By Counsel for Complainant:

"He delivered me no other papers.

I did not measure off the 2 acre tract up there. I measured off the Clark tract to the West of it. That was at the time I sold the 2 acre tract for the heirs of J. R. Mings to Mr. Jordan. Jordan sold it to Clark. I never heard of any claim by anybody to a strip between the Clark land and the L. J. Rogers land. The Rogers heirs owned these 2 acres until I bought them. My understanding was that the Northwest corner of the 2 acres tract and the Northeast corner of the Clark or Wiley Davis tract was one and the same corner. I understood the line coincided, that is, my line and the Clark and Davis line were coincident."

Cross Examination.

By Counsel for Defendants:

"I bought 25 acres from J. W. Mings and then I bought 2 acres from Mrs. L. J. Rogers, J. E. Rogers and Mrs. Elvie Waskom."

Re-Direct Examination.

By Counsel for Complainant:

"I owned the 2 acres just East of the G. W. Clark land."

Counsel for Complainant:

"We offer in evidence a stipulation as to the testimony of R. M. Wood, with certain exhibits attached."

The Court:

"The stipulation is admitted, including the exhibits and is as follows:

273 "In the District Court of the United States, for the Eastern District of Texas, Tyler Division.

Empire Gas & Fuel Company
vs. No. 803 In Equity.
B. P. Dunlap, et al.

It is stipulated that the witness, R. M. Wood testified that he was the grantee in plaintiff's exhibit No. A, being a deed dated May 8, 1917, (erroneously dated 1918), and at the time he purchased the second tract, being two (2) acres, more or less, the grantor, J. W. Mings, was in possession thereof under fences, except possibly in front of the house and between the road and the yard fence there was an open space of a few feet. The west fence of the tract above the yard fence enclosed an orchard and was on the east edge of the road and about thirty-five (35) feet from the east fence on the tract formerly belonging to Wiley Davis and now owned by G. W. Clark. The north fence was on the south side of a lane and cornered on the east near the post oak tree referred to in the description. The fence then ran southerly and connected with the yard fence which surrounded the residence on the south part of the tract. The witness and Mings measured off the land.

The witness further testifies that he was the grantor, along with his wife, in plaintiff's Exhibit No. B, being a deed to Mrs. Eva Patterson, dated September 5, 1917, covering as the second tract said two (2) acres, more or less mentioned above, and that at the time of the sale to Mrs. Patterson he was in possession under the same fences.

The witness further testifies that he handled the sales from Mrs. Eva Patterson to Mrs. J. H. Wilkins, evidenced by plaintiff's Exhibit No. C, which is dated April 17, 1918, and from Mrs. J. H. Wilkins to J. G. Pegues, which is evi-

denced by plaintiff's Exhibit No. D, dated January 23, 1922. The witness took Mrs. Wilkins out and showed her the corners and fences, which were the same as testified to above.

In each of the sales above mentioned the first tract was approximately 23½ acres out of the northeast corner of the G. A. Thomason Survey and was supposed to be the north twenty-five (25) acres of the W. H. Rogers original tract except two (2) acres off the west side thereof which the witness also owned at one time, as is shown by the evidence.

It is further stipulated that the attached deeds are in evidence as plaintiff's Exhibits Nos. A, B, C, D, E and F.

(Signatures)

274 EXHIBIT No. A.

"Deed.

"J. W. Mings et ux to R. M. Wood.

Dated: May 8, 1918.

Filed: May 10, 1917, 1:00 P. M.

Recorded: Vol. 32, page 565, Deed Records, Gregg Co., Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That we, J. W. Mings and wife, Addie Mings, of the county of Harrison, State of Texas, for and in consideration of the sum of five

hundred ($500.00) dollars to us paid, and secured to be paid by R. M. Wood as follows:

Two hundred ($200.00) Dollars to us cash in hand paid the receipt of which is hereby acknowledged and the execution and delivery of two certain promissory notes of even date herewith, each in the sum of $150.00 and due on or before January 1st, 1918, and January 1st, 1919, respectively. Said notes to bear interest at the rate of 8% per annum, the interest payable annually as it accrues, at Gladewater, Texas, and payable to J. W. Mings or order. Have Granted, Sold and Conveyed, and by these presents do grant, sell and convey, unto the said R. M. Wood of the County of Gregg, State of Texas, all that certain tracts or parcels of land situated in Gregg County, Texas, about two and one-half miles East of Gladewater and being a part of the G. A. Thomason H. R. Survey and described by metes and bounds as follows, to-wit:

First Tract: Beginning at the NE corner of said G. A. Thomason survey an iron stake for corner;

Thence West 444.5 vrs. with NB line of said G. A. Thomason survey to corner, witness P. O. tree 24 inches in diameter brs. N. about 30 deg. W. 27 feet;

Thence S. 298 vrs. to the W. H. Conn 50 acre tract to corner, said corner being 118 feet and 3 inches E. of the N. W. corner of said W. H. Conn 50 acre tract;

Thence East 444.5 vrs. to the W. B. line of W. G. Painter Survey an iron stake for corner;

Thence North with WB line of said G. A. Thomason Survey 298 vrs. to the place of beginning, containing 23½ acres of land, more or less.

This being the same land conveyed by E. L. Walker, M. D., and Nannie E. Walker to the grantor herein by

deed dated Nov. 25th, 1910, recorded in Vol. "X," on pages 278 and 279, Gregg County, Texas.

Second Tract: Being a part of the G. A. Thomason Survey in Gregg County, Texas, about two and one-half miles East of Gladewater, and described by metes and bounds as follows, to-wit:

Beginning at the N. W. corner of J. F. Rogers estate 68 acre tract of land, said beginning corner being about 953 vrs. West of the N. E. corner of G. A. Thomason H. R. Survey.

275 Thence East 147 feet to corner on the N. B. line of said G. A. Thomason H. R. Survey witness P. O. tree about 12 inches in diameter brs. W. 5 feet;

Thence South with fence 757 feet to corner said corner being 21 feet SE of the SE corner of residence;

Thence West 115 feet to the Union Grove Public Road; same being the E. B. line of a 26 acre tract conveyed by Victory to Davis. Vol. "R," page 406, witness B. J. tree about 16 inches in diam. brs. N. about 10 deg. E. 75 feet;

Thence North with meanderings of said road to the place of beginning containing about two acres of land, more or less. This being the same land conveyed to the grantors herein by Mrs. L. J. Rogers, Elvie Waskom and J. E. Rogers by deed dated May 7th, 1917.

To have and to hold the above described premises, together with all and singular the right and appurtenances thereto in anywise belonging unto the said R. M. Wood, his heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto the said R. M. Wood, his heirs and

assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

But it is expressly agreed and stipulated that the vendor's lien is retained against the above described property, premises and improvements, until the above described notes and all interest thereon are fully paid according to their face and tenor, effect and reading, when this deed shall become absolute.

Witness our hands at Marshall, Texas, this 8 day of May, A. D. 1918.

J. W. MINGS,
ADDIE MINGS."

(Acknowledgment.)

(Certificates of County Clerk and Abstract Company.)

EXHIBIT No. B.

"Deed.

"R. M. Wood et ux to Mrs. Eva Patterson.

Dated: Sept. 5, 1917.

Filed: March 2, 1918, 3:00.

Recorded: Vol. 35, page 111, Deed Records, Gregg Co., Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That we, R. M. Wood and wife, Bettie Wood, of the County of Gregg, State of Texas, for and in consideration of the sum of

eight hundred ($800.00) dollars to us paid, and secured to be paid, by Mrs. Eva Patterson as follows:

276 Four Hundred ($400.00) Dollars to us cash in hand paid the receipt of which is hereby acknowledged and confessed, and the further payment of four certain promissory notes as follows:

Note No. 1 for $100.00 due Oct. 1st, 1918;

Note No. 2 for $100.00 due Oct. 1st, 1919;

Note No. 3 for $100.00 due Oct. 1st, 1920; and

Note No. 4 for $100.00 due Oct. 1st, 1921,

all of the above notes dated Sept. 5th, 1917, and bear interest from the date at *at* the rate of 8% per cent. per annum, the interest payable annually as it accrues, both principal and interest being payable to R. M. Wood or order at Gladewater, Texas, have granted, sold and conveyed and by these presents do grant, sell and convey unto the said ..... of the County of Smith, State of Texas, all that certain tracts or parcels of land described as follows, to-wit:

First Tract: A part of the G. A. Thomason Survey in Gregg County, Texas, same being located about 2½ miles East from the town of Gladewater, and described by metes and bounds as follows:

Beginning at the N. E. corner of said G. A. Thomason Survey;

Thence West 487 vrs. to the N. E. Corner of J. F. Rogers 68 acre tract;

Thence South with J. F. Rogers tract 298 vrs.;

Thence East 487 vrs. to E. B. line of G. A. Thomason Survey;

Thence North 298 vrs. to the place of beginning, containing 25.68 acres of land.

Second Tract: A part of the same survey:

Beginning at the N. W. corner of J. F. Rogers estate 68 acre tract of land, said beginning corner being 953 vrs. West of the N. E. corner of said G. A. Thomason Survey.

Thence East 144 feet to corner on N. B. line of G. A. Thomason Survey witness P. O. 12" in dia. brs. W. 5 feet;

Thence South with fence to corner, said corner being 21 feet SE of the SE corner of residence;

Thence West 115 feet to W. B. line of said J. F. Rogers 68 acre tract;

Thence North with W. B. line of said J. F. Rogers 68 acre tract to the place of beginning, containing 2.32 acres of land.

The first described tract being the same land conveyed by W. H. Rogers, et ux, Lizzie Rogers, and W. A. Wright to Mrs. E. L. Walker by deed dated Nov. 23, 1910, recorded in Vol. "X" on page 278 Deed Records of Gregg County, Texas.

The second tract herein described is the same land conveyed to Mrs. L. J. Rogers, J. E. Rogers, Elvie Waskom et vir Azzie Waskom to J. W. Mings, by deed dated May 7, 1917, recorded in Vol. "32" on page 563 deed records of Gregg County, Texas.

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To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Mrs. Eva Patterson, a feme sole, her heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto the said Mrs. Eva Patterson, her heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

But it is expressly agreed and stipulated that the vendor's lien is retained against the above described property, premises and improvements, until the above described notes and all interest thereon are fully paid according to their face and tenor, effect and reading, when this deed shall become absolute.

Witness our hands at Gladewater, Texas, this 5th day of Sept., A. D. 1917.

R. M. WOOD,
BETTIE WOOD."

(Acknowledgment.)

EXHIBIT No. C.

"Deed.

"Mrs. Eva Patterson to Mrs. J. H. Wilkins.

Dated: April 17, 1918.

Filed: May 7, 1919, 9 A. M.

Recorded: Vol. 37, page 473, Deed Records, Gregg County, Texas.

Deed.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, Mrs Eva Patterson (a feme sole) of the County of Gregg, State of Texas, for and in consideration of the sum of One Thousand ($1000.00) and no/100 Dollars to me paid, and secured to be paid by Mrs. J. H. Wilkins, (a feme sole), the receipt of which is hereby acknowledged as follows:

Five hundred ($500.00) Dollars cash paid by the said Mrs. J. H. Wilkins from her separate estate, and two certain promissory notes of even date herewith executed by the said Mrs. J. H. Wilkins in the sum of One Hundred ($100.00) Dollars each payable to Mrs. Eva Patterson on or before the 1st day of October, 1922 and 1923, respectively; said notes bearing interest from date at
278 the rate of eight per cent per annum and payable in the town of Gladewater, Texas.

And the further consideration that the said Mrs. J. H. Wilkins assume payment of three certain promissory notes bearing date September 5th, 1917, executed by Mrs. Eva Patterson in the sum of $100.00 each payable to R. M. Wood or order, due October 1st, 1919, 1920 and 1921, respectively, said last named three notes being fully described in a deed from R. M. Wood and wife, Bettie Wood, to Mrs. Eva Patterson dated September 5th, 1917, and of record in Vol. 35, on pages 111, Deed Records of Gregg County, Texas.

Note No. One as described in said deed from R. M. Wood and wife has this day been paid and all interest on the three notes above assumed is paid to date.

Have granted, sold and conveyed and by these presents do grant, sell and convey, unto the said Mrs. J. H. Wilkins,

her separate estate of the County of Gregg, State of Texas all that certain tracts or parcels of land in the County of Gregg and State of Texas, being a part of the G. A. Thomason Headright Survey and described in two tracts as follows:

First Tract: Located about two and one half miles east from the town of Gladewater,

Beginning at the northeast corner of original headright survey;

Thence west 487 vrs. to the northeast corner of a 68 acre tract of land known as J. F. Rogers tract;

Thence South with said Rogers tract 296 vrs.;

Thence East 487 vrs. to the east boundary line of said original headright survey;

Thence North 298 vrs. to place of beginning, containing 25.68 acres of land.

Second Tract: Beginning at the northwest corner of J. F. Rogers 68 acre tract, said beginning corner being 953 vrs. west from the northeast corner of original survey;

Thence East 144 feet to corner on the north boundary line of said original survey, a post oak brs. W. 5 feet;

Thence South with fence to corner, said corner being 21 feet southeast of the southeast corner of residence;

Thence West 115 feet to west boundary line of said J. F. Rogers 68 acre tract;

Thence North with said Rogers tract of 69 acres to the place of beginning, containing 2.32 acres of land, both

tracts herein conveyed and containing 28 acres of land, more or less;

The said 28 acres of land herein conveyed is my separate estate, same being purchased from R. M. Wood and his wife, cash payments for same was made from insurance money left me by my deceased husband.

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Mrs. J. H. Wilkins, heirs and assigns forever; and
279 I do hereby bind myself, heirs, executors and administrators, to warrant and forever defend, all and singular the said premises unto the said Mrs. J. H. Wilkins, her heirs and assigns, against every person, whomsoever lawfully claiming, or to claim the same, or any part thereof.

But it is expressly agreed and stipulated that the vendor's lien is retained against the above described property, premises and improvements, until the above described notes and all interest thereon are fully paid according to their face and tenor, effect and reading, when this deed shall become absolute.

Witness my hand at Gladewater, Texas, this 17th day of August, A. D. 1918.

MRS. EVA PATTERSON.

$1.00 revenue stamp affixed and canceled."

(Acknowledgment.)

EXHIBIT No. D.

"Deed.

"Mrs. J. H. Wilkins to J. G. Pegues.

Dated: Jan. 3, 1922.

Filed: Jan. 17, 1922, 10:00.

Recorded: Vol. 44, page 31, Deed Records, Gregg County, Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, Mrs. J. H. Wilkins, a feme sole, of the County of Gregg, State of Texas, for and in consideration of the sum of eight hundred dollars to me paid by J. G. Pegues as follows: Five hundred dollars cash in hand paid, the receipt of which is hereby acknowledged, and the assumption by the said J. G. Pegues of the payment of the principal of notes 3 and 4 due 10/120 and 10/1/21 respectively, given to R. M. Wood by Mrs. Eva Patterson, dated 9/5/17, as shown in deed of said R. M. Wood to said Mrs. Eva Patterson, said notes being for $100.00 each, recorded in Vol. 35, page 111, Deed Records of Gregg County, Texas; also, the assumption by the said J. G. Pegues of the payment of the principal of note No. 2, due on or before 10/1/23, given by Mrs. J. H. Wilkins to Mrs. Eva Patterson, being for $100.00 and dated 4/17/18; it being expressly understood that said J. G. Pegues obligates himself to pay the principal of said notes, together with all interest accruing thereon from this date, and
280 to hold the said Mrs. J. H. Wilkins free from all liability on account thereof; have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said J. G. Pegues, of the County of Gregg,

State of Texas, all that certain tracts or parcels of land, in the County of Gregg, State of Texas, being a part of the G. A. Thomason H. R. Survey, and described in two tracts as follows:

First Tract: Located about 2½ miles east from the town of Gladewater, beginning at the N. E. corner of original headright survey;

Thence W. 487 vrs. to the N. E. corner of a 68 acre tract of land, known as J. F. Rogers tract;

Thence South with said Rogers tract 298 vrs.;

Thence East 487 vrs. to the east boundary line of said original headright survey;

Thence N. 298 vrs. to the place of beginning, containing 25.68 acres of land.

Second Tract: Beginning at the N. W. corner of J. F. Rogers 68 acre tract, said beginning corner being 953 vrs. west from the N. E. corner of original survey;

Thence E. 144 feet to corner on the NBL of said original survey a post oak brs. W. 5 feet;

Thence S. with fence to corner, said corner being 21 feet SE of the SE corner of residence;

Thence W. 115 feet to WBL of said J. F. Rogers 68 acre tract;

Thence N. with said Rogers tract of 68 acres to place of beginning, containing 2.32 acres of land. Both tracts herein conveyed containing 28 acres of land more or less. The said 28 acres of land herein conveyed is my separate estate, same being purchased by me from R. M. Wood

and his wife, cash payments for same were made from insurance money left me by my deceased husband.

To have and to hold the above described premises, together with all and singular the right and appurtenances thereto in anywise belonging unto the said J. G. Pegues, his heirs and assigns forever; and I do hereby bind myself, my heirs executors and administrators to warrant and forever defend all and singular the said premises unto the said J. G. Pegues, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

But it is expressly agreed and stipulated that the vendor's lien is retained against the above described property, premises and improvements, until the above described note and all interest thereon are fully paid according to face and tenor, effect and reading, when this deed shall become absolute.

Witness my hand at Longview, Texas, this 3rd day of January, A. D. 1922.

MRS. J. H. WILKINS.

$.50 revenue attached."

(Acknowledgment.)

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EXHIBIT No. E.

"Deed.

"J. G. Pegues to J. W. Akin.

Dated Nov. 10, 1927.

Filed November 12, 1927, 1: P. M.

Recorded: Vol. 55, Page 57, Deed Records Gregg County, Texas.

Deed.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, J. G. Pegues, of the County of Gregg, State of Texas, for and in consideration of the sum of five thousand five hundred fifty and no/100 dollars to me in hand paid by J. W. Akin, as follows:

$250.00 cash in hand paid, the receipt whereof is hereby acknowledged, and the said J. W. Akin and wife this day conveying to me lots No. 1 & 8, in Block No. 2, of the Lacy-Bass Addition to the City of Longview, now being Lots No. 1 & 8 in New City Block No. 204, of the said City of Longview, in Gregg County, Texas.

Have granted, sold and conveyed and by these presents do grant, sell and convey unto the said J. W. Akin of the County of Gregg, State of Texas, all that certain lots, tracts or parcels of land situated about 10 miles west of Longview, in Gregg County, Texas, as follows:

First and Second Tracts: Being 42.6 acres and 95.5 acres of land, fully described as tracts Nos. 1 and 2, in a deed from W. H. Evans et ux to J. G. Pegues, dated Oct. 28, 1918, and duly recorded in Gregg County Deed Records, Book 38, page 198, to which record reference is here made for a more particular description.

Third Tract: Being 28 acres adjoining the above, in Gregg County, Texas, fully described in a deed from Mrs. J. H. Wilkins to J. G. Pegues, dated Jan. 3rd, 1922, and duly recorded in Vol. 41, page 31-3 Gregg County Deed Records. The three above described tracts of land contain in all 166 acres of land, more or less, and are located on the Wm. G. Painter and G. A. Thomason surveys, in Gregg County, Texas.

To have and to hold the above described premises together with all and singular the rights and appurtenances thereto in anywise belonging unto the said J. W. Akin, his heirs and assigns, forever; and I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend, all and singular the said premises unto the said J. W. Akin, his heirs and assigns, against every person whomsoever lawfully claiming or
282 to claim the same, or any part thereof.

Witness my hand at Longview, Texas, this 10th day of Nov., A. D. 1927.

J. G. PEGUES."

(Acknowledgment.)

EXHIBIT No. F.

"Deed.

"J. W. Akin to Geo. Clark.

Dated: Jan. 3, 1930.

Filed: Jan. 15, 1930.

Recorded: Vol. 58, page 542, Deed Records, Gregg Co., Texas.

The State of Texas,
County of Gregg.

Know All Men By These Presents: That I, J. W. Akin, of the County of Gregg, State of Texas, for and in consideration of the sum of Two Hundred Fifty and no/100 Dollars to me paid and secured to be paid by Geo. W. Clark as follows: $50.00 cash in hand paid, the receipt whereof is hereby acknowledged, and his two notes of even date herewith for $100.00 each, due Nov. 1, 1930 and

1931, each respectively, bearing 10% interest per annum from date and in certain contingencies providing for attorneys' fees, have granted, sold and conveyed and by these presents do grant, sell and convey unto the said Geo. W. Clark, of the county of Gregg, State of Texas, all that certain lot, tract or parcel of land, situated in Gregg County, Texas, and being a part of the G. A. Thomason H. R. Survey and

Beginning at the N. W. corner of Rogers 68 acre tract;

Thence E. 144 feet to corner;

Thence S. with fence to corner;

Thence W. 115 feet to W. B. L. of 68 acre tract;

Thence N. with 68 acre tract to beginning, containing 2.32 acres of land, more or less, fully described in deed from Mrs. J. H. Wilkins to J. G. Pegues, recorded in Vol. 44, pages 31-33, Gregg County, Deed Records, to which reference is here made.

To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Geo. W. Clark, his heirs and assigns forever; and I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said Geo. W. Clark, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

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But it is expressly agreed and stipulated that the vendor's lien is retained against the above described property, premises and improvements, until the above described note and all interest thereon are fully paid

according to face and tenor, effect and reading, when this deed shall become absolute.

Witness my hand at Longview, this 3rd day of Jan., A. D. 1930.

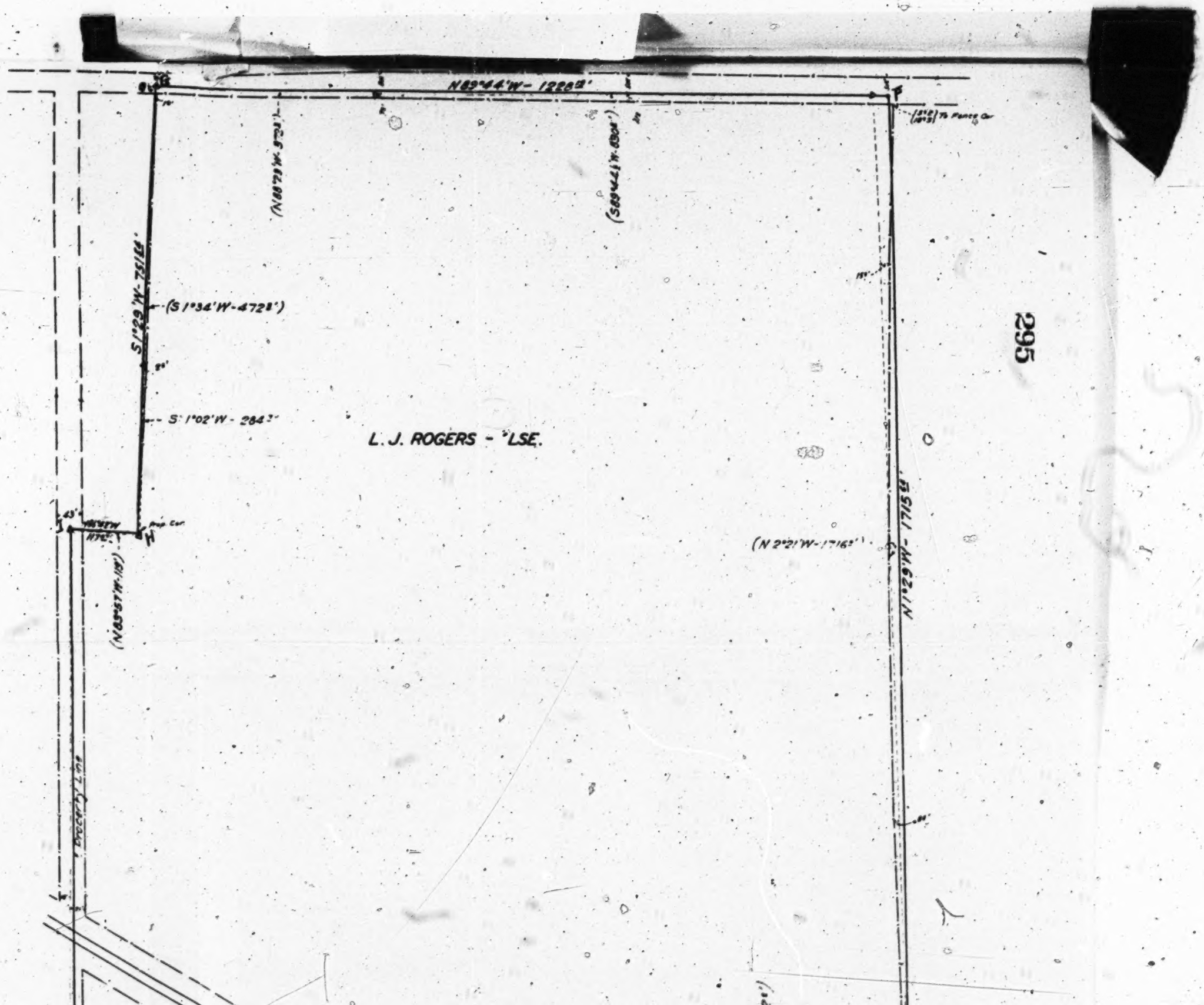
J. W. AKIN."

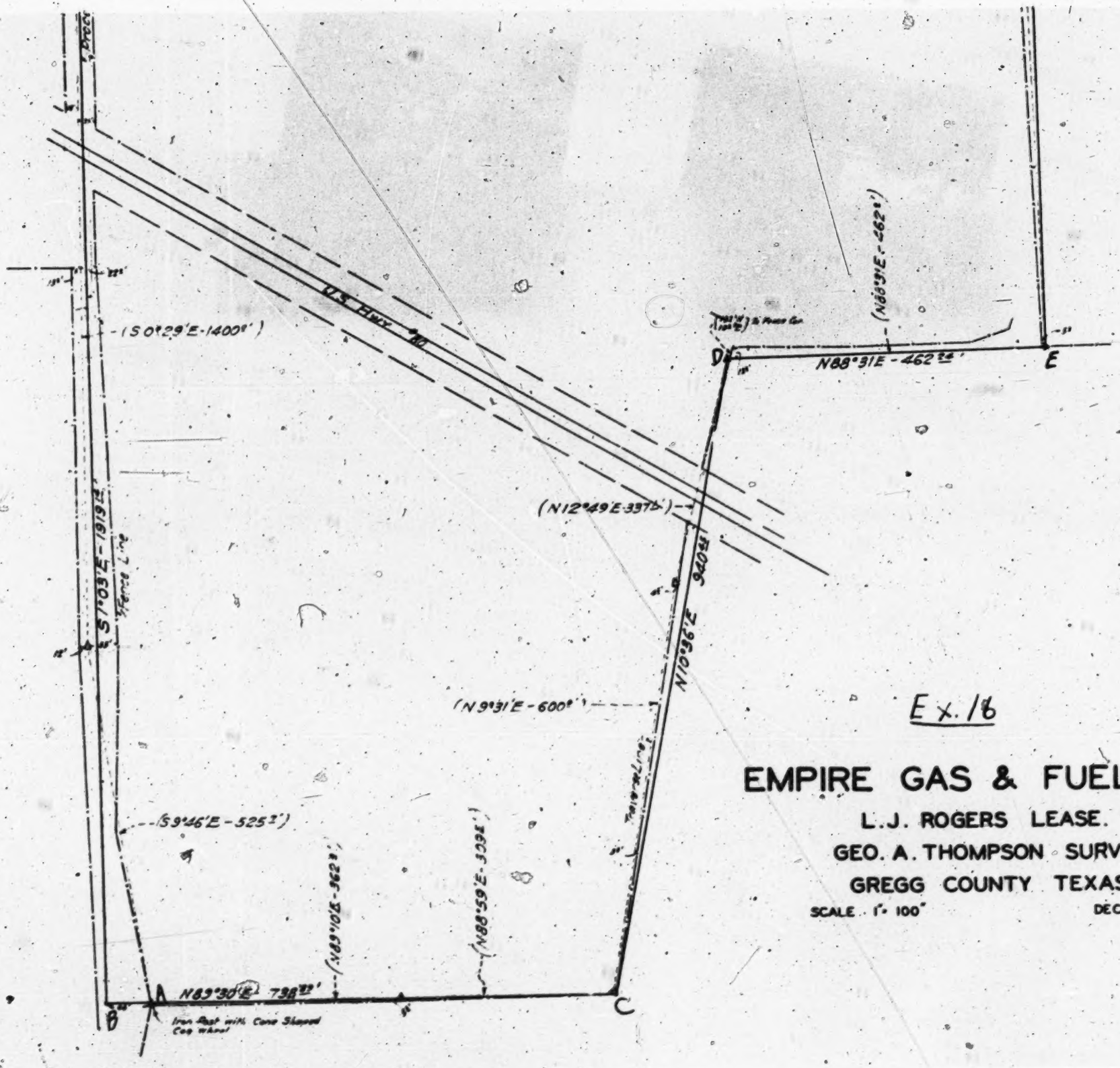
(Acknowledgment.)

Counsel for Complainant:
"We close."

Counsel for Defendants:
"We close."

The Court took the case under advisement.


N89°44'W - 1228.2'
(S89°44'W-1230')
(N89°44'W-1228')
S1°22'W - 4715.2'
(S 1°34'W-4728')
S 1°02'W - 284.3'
L. J. ROGERS - LSE.
(N 2°21'W-1716')
N1°29'W - 1715.8'
(N89°53'W-1811')
295



Ex. 16

EMPIRE GAS & FUEL CO.

L.J. ROGERS LEASE.

GEO. A. THOMPSON SURVEY.

GREGG COUNTY TEXAS.

SCALE 1" = 100'

DEC. 14.1934.

EXHIBIT No. 38.

EXHIBIT No. 38-A.

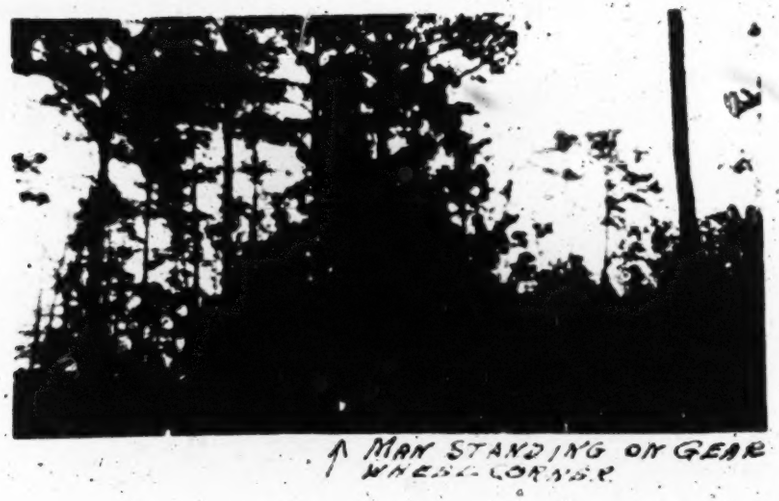


EXHIBIT No. 39.

EXHIBIT No. 40.

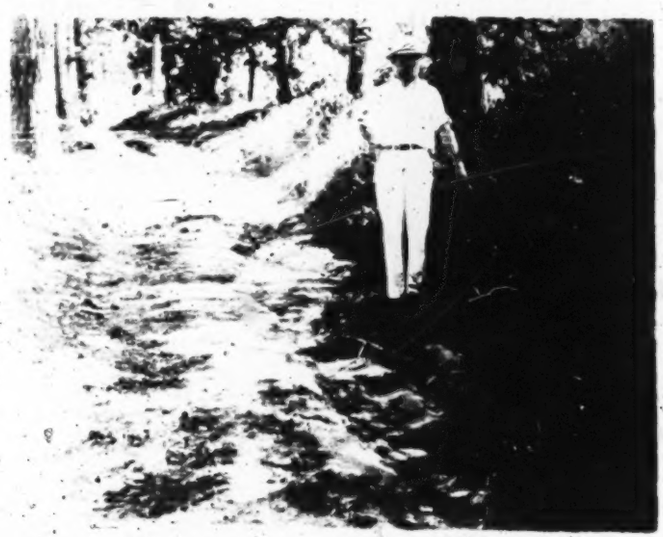


EXHIBIT No. 41.

EXHIBIT No. 42.

284 Agreement of Counsel.

We, the undersigned attorneys of record for the respective parties in this cause, hereby agree that the foregoing constitutes a full, true and correct statement of all the evidence and bill of exceptions in the case of Empire Gas & Fuel Company v. B. P. Dunlap, et al., No. 803, in Equity, Tyler Division of the United States District Court in and for the Eastern District of Texas, and hereby approve the same.

Witness our hands this the 10 day of May, 1938.

H. J. PATTERSON,
DAVID B. TRAMMELL,
CLAYTON L. ORN,
Attorneys for Complainant.
WYNNE & WYNNE,
Attorneys for Defendants.
ANGUS G. WYNNE.

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285 JUDGE'S APPROVAL

The foregoing record of 167 [typewritten] pages, being numbered 1 to 167, inclusive, having been approved by counsel for the respective parties, and having been examined and found correct, said record is hereby approved as a statement of all the evidence and bill of exceptions in the case of Empire Gas & Fuel Company v. B. P. Dunlap, et al., No. 803 in Equity, Tyler Division of the United States District Court in and for the Eastern District of Texas, and ordered filed as a part of the record in said cause. The portions of testimony copied in this statement in question and answer form are hereby approved.

The acknowledgments to the instruments introduced in evidence are omitted from this statement for the pur-

pose of shortening the record, there being no issues raised in this Court concerning said acknowledgments.

Approved at Sherman, Texas, this the 15th day of June, A. D. 1938.

RANDOLPH BRYANT,
United States District Judge.

Filed May 26, 1938.

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286 PETITION FOR APPEAL.

In the District Court of the United States, for the Eastern District of Texas, Tyler Division.

Empire Gas & Fuel Company, Cities Service Oil Company, (Formerly Empire Oil & Refining Company), Substitute Complainant,

vs. No. 803—Equity.

B. P. Dunlap, et al.

To the Honorable Randolph Bryant, Judge of the District Court Aforesaid:

Cities Service Oil Company (whose corporate name formerly was Empire Oil & Refining Company), a corporation, incorporated under the laws of the State of Maine, substituted as Complainant in this case in lieu of the original Complainant, Empire Gas & Fuel Company, a corporation, incorporated under the laws of the State of Maine, feeling aggrieved by the decree entered in the above entitled and numbered cause on the 30th day of April, A. D. 1938, hereby appeals from said decree to the United States Circuit Court of Appeals for the Fifth Circuit. The errors upon which this appeal is based are contained in the assignment of errors filed herewith. Appellant further shows to the Court that it is the only party interested in such appeal.

The decree entered herein is that petitioner does not own the oil and gas leasehold estate on the tract of land described in paragraph 2 of said decree, and should take nothing against defendants, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, Curtis M. Willock and J. B. Parker, and that said bill is dismissed for want of equity; and that defendant, B. P. Dunlap, on his cross-action filed herein, have of and recover from petitioner, Cities Service Oil Company (formerly Empire Oil & Refining Company) judgment and decree quieting his title and possession of the oil and gas leasehold estate on said
287 tract of land described in paragraph 2 of said decree; that Curtis M. Willock and J. B. Parker are bound by the decree. Petitioner desires to appeal from the entire decree, which dismissed said bill of complaint for want of equity, and quieted B. P. Dunlap in his title and possession of the said land and premises on his cross-action filed herein. This petition is filed at the same term of the Court at which the decree was entered.

Wherefore, appellant prays that its appeal be allowed; that a citation to B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, Custis M. Willock and J. B. Parker be issued in accordance with law; and that an authenticated transcrip of the record, proceedings and exhibits on the trial be forwarded to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana. Your petitioner further prays that an order be made, fixing the amount of security to be given by appellant, conditioned as provided by law.

DAVID B. TRAMMELL,
CLAYTON L. ORN,
Attorneys for Appellant.

Filed June 15, 1938.

288 ASSIGNMENTS OF ERROR.

(Title Omitted.)

The Complainant files the following assignment of errors upon which it will rely on appeal to the United States Circuit Court of Appeals for the Fifth Circuit:

I.

The Court erred in entering the decree filed herein after making the findings of fact, because an instrument which partitions or conveys land bounded by a public or private road wholly laid out on the land belonging to the grantor carries with it title to all the road even though the metes-and-bounds description by course and distance extends only to the inside edge of said road, unless said instrument expressly reserves the fee title to said road. The Court found substantially the following as the facts: (a) the four heirs of Louisa Rogers owned on February 28, 1899, the 66-foot strip of land in controversy, which was a part of the east one-half of said Thomason Survey and was situated along the west side of said east one-half; (b) that on said date said heirs employed a surveyor to make a survey for the purpose of partitioning said east one-half into three parcels; (c) that the surveyor when running the north line of the east one-half stopped at a point 880 yards west of the northeast corner, said point lacking 66 feet of going to the west line of the east one-half of said survey, and set a stake, and then surveyed south 880 yards and set another stake, leaving the 66-foot strip out for a road, at the request of said heirs, said strip then being used in part for a road; (d) that thereafter,

289 the heirs exchanged deeds, the said J. F. Rogers being partitioned a tract that the field notes in his deed when applied to the ground by course and distance (and the call for the Wiley Davis northeast corner rejected) extended only to the inside (east) line of

said road, and not to the west line of the east one-half of said survey (outer edge of said road); (e) that the heirs of J. F. Rogers, on October 20, 1930, made an oil and gas lease to W. P. Chandler, using the same metes and bounds description that was contained in the partition deed to J. F. Rogers, which lease was subsequently acquired by Complainant; and (f) that subsequent to said Chandler lease, and after same had been recorded, defendant Dunlap acquired from the heirs of Louisa Rogers, an oil and gas lease that described the 66-foot strip, so that the east line of said strip was coincident with the west line of the tract of land described by metes and bounds in the partition deed to J. F. Rogers, after rejecting the call for the Wiley Davis northeast corner. Under said findings of fact, Complainant's lessors acquired by said partition deed the fee simple title to all of said 66 foot strip since his field note description by course and distance went to the inner edge of the road, which road was wholly laid out on land belonging to his grantors, and Complainant likewise acquired an oil and gas lease thereon and was entitled to a decree quieting its title.

II.

The Court erred in making and entering findings of fact Nos. 14 and 15 as follows:

"14. The Court finds that J. F. Rogers never acquired title under the partition deed executed February 28, 1899, to the strip of land situated between a line run South from the Wiley Davis northeast corner and a line run South from a point 880 yards west of the northwest corner of the Thomason Survey to the gear shaft. The Court finds that J. F. Rogers never acquired title under said partition deed to said strip, but that all land lying between a line run south from the Wiley Davis Northeast corner and a line run south from a point 880 yards west of the northeast corner of said Thomason Survey was not covered

by said deed. When Mrs. L. J. Rogers and her
290 two children made, executed and delivered to W. P. Chandler, on October 20, 1930, the oil and gas lease under which Complainant claims title to the strip, said Mrs. L. J. Rogers and her children did not own the fee simple title to all of said strip of land, but said fee simple title was then owned by the said heirs of Louisa Rogers, deceased.

15. The Court finds that the oil, gas and mineral lease and leasehold estate of Complainant, Empire Oil & Refining Company, originally executed in favor of W. P. Chandler, dated November 18, 1930, does not cover nor include any land west of a line running north from the old bevel gear and said oil and gas lease does not cover and include the 66 foot strip situated between the line running south from the Wiley Davis northeast corner, wherever situated, and a line running south from a point on the north line of the Thomason Survey 880 yards west of the northeast corner to the gear shaft, and that the West line of plaintiff's lease coincides with the East line of the Dunlap lease."

For the reasons set forth in Complainant's objections and exceptions to the findings of fact and conclusions of law, paragraph 4 of Section IV as follows:

"(4) The finding is contrary to the law when applied to the other findings of the Court because the Court has found that the 66 foot strip was being used as a road at the time of the partition and has found that the course and distance calls of the field notes in the partition deed to J. F. Rogers extended only to the East (inner) edge of said road. Therefore the Court should have found that the title to said strip passed to J. F. Rogers under the partition deed subject to the easement, it being the law that where a road is wholly laid out on property of the grantor, the grantee will take fee title to all the road

where the field note description goes to the inner edge of said road."

III.

The Court erred in entering the decree filed herein because the Rogers' heirs in 1899 delivered to J. F. Rogers a partition deed describing the land as "starting at the Northeast corner of Lot No. 2, which is the Northwest corner of the W. H. Rogers tract, Lot No. 1, running West 440 yards to Wiley Davis Northeast corner; thence South 880 yards," etc., vesting J. F. Rogers with the legal title to all land lying between the North west corner of Tract No. 1, partitioned to W. H. Rogers and the Wiley Davis Northeast corner, even though the call for 440 yards lacked 66 feet of going to said Davis Northeast corner. Whatever interest remained in the grantors the said partition deed, by reason of any mistake in inserting the call for the Wiley Davis Northeast corner, was an equity, of which there was no written record, and Complainant and its predecessor in title, Chandler, having purchased the oil and gas lease from J. F. Rogers' widow and heirs, without notice of any equity in the heirs of Louisa Rogers, and without notice that the said call for the Wiley Davis Northeast corner was inserted through mistake, was justified in relying on the legal presumption that a call for adjoinder will control a call for distance, and the legal presumption that the parties intended to partition all the land and not leave small irregular strips. A decree should have been entered quieting Complainant's title to all land lying between the Northwest corner of Lot No. 1 and the Wiley Davis Northeast corner, even though said corners were 440 yards plus 66 feet apart.

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IV.

The Court erred in making and entering the following conclusions of law:

"2. That the call for the Wiley Davis corner in the partition deed of 1899 and subsequent instruments following

such deed call, should be rejected as inserted by mistake, and controlling effect should be given to course and distance from the known and undisputed northeast corner of the Thomason Survey, and other known and undisputed corners, line trees and corners agreed to be correct at the trial, for such construction is most consistent with the intention of the parties to the deeds from the entire description and the equities of the case from all the facts, and is most consistent with the construction of the calls by the parties themselves, as evidenced by their acts and conduct over a period of about 30 years subsequent to the date of the partition and prior to discovery of oil in East Texas.

3. The Respondent Dunlap is entitled to have the title to such tract of land quieted as against Complainant on his plea for affirmative relief.

4. The Court concludes that extrinsic evidence was admissible to show that the surveyor Simmons, at the time he made the partition survey, placed a stake at a point 880 yards west of the northeast corner of the said Thomason Survey for the northwest corner of the J. F. Rogers tract, and another stake 880 yards south thereof at a point now, and for more than 30 years, located by the old gear wheel. Also, extrinsic evidence was admissible to prove that one of the stakes was removed and the gear-shaft placed where said stake was originally driven, as the Court concludes that the correction lease obtained either does not cover the 66 feet involved in this controversy or it takes in more land than it was represented to cover at the time it was obtained."

292 For the reasons set forth in Complainant's objections to the conclusions of law, paragraph 3 of Section VIII. as follows:

"(3) Complainant being an innocent purchaser under a chain of transfers calling for the Wiley Davis North-

east corner was entitled to rely upon said call for adjoinder and parol testimony was not admissible against it to show that the call for the Wiley Davis Northeast corner was inserted through a mistake of the Rogers' heirs. Complainant was entitled to rely upon the presumption of law that where owners executed partition deeds they intended to partition all the land and not leave small, irregular shaped tracts unpartitioned and was further entitled to rely upon the presumption that the parties intended to partition the whole tract of land because there was no express exception of said 66 foot strip. There was no testimony introduced showing that Complainant knew that the distance of the North line called for in the partition deed would not reach the Wiley Davis Northeast corner."

V.

After Complainant had introduced in evidence a deed from the heirs of Louisa Rogers partitioning to J. F. Rogers a tract of land with field note calls "starting at the Northeast corner of Lot No. 2, which is the Northwest corner of the W. H. Rogers tract, Lot 1, running West 440 yards to Wiley Davis Northeast corner; thence South 880 yards," under which deed Complainant claimed title to said strip, and after the evidence had shown that in order to reach the Wiley Davis Northeast corner the distance must be extended 66 feet over the call of 440 yards, the Court erred in overruling Complainant's objections to the testimony of defendant, F. E. Rogers, on direct examination given on behalf of defendants, as follows:

"When we went to partition the same, we employed J. H. Simmons to make a survey. I knew Mr. Simmons and Mr. Simmons is the same man who surveyed out the West half as testified by Mr. York. We employed him a long time after 1880 when he had established the red oak and the post oak tree.

When he came out to make the survey, I went with him. We four boys were the chain-carriers.

Q. What did you say to Mr. Simmons, and what did he say to you, about the partition of the land, and how you would partition it?

Counsel for Complainant:
May we have an objection to all of this as irrelevant and immaterial, and incompetent in view of the calls in the deed, which call from a point to a point, the Northwest corner of our tract calling for an adjoinder of the Wiley Davis tract outside of this land? It varies the terms of a written instrument.

293 The Court:
The objection is overruled.

Counsel for Complainant:
We except; and may we have a general objection and exception to all that, so we need not repeat it?

The Court:
Yes.

(Direct Examination Resumed.)

Counsel for Defendants:
Q. Tell what you said to Mr. Simmons?
A. I asked him if he could do some surveying for us; and he said he could, and came down. And he said: 'Do you know of a definite corner that we can start from.'"

Counsel for Complainant:
"We object—"

The Court:
"It was in fact a partition, wasn't it?"

(Direct Examination Resumed.)

Counsel for Defendants:

"Mr. Simmons went to the Northeast corner of the old home place and he found the markers that looked like they had been there for ages and ages. That is the Northeast corner represented by the fence corner up there at the Northeast corner of the 25 acre tract. If this map (Exhibit No. 14) represents the 320 acres we began at the Northeast corner.

I told him I wanted him to divide that land into four 80 acre blocks. He ran West 440 yards and then ran South what we would term one-half of the ground, 880 yards, I believe. He then ran back to the East line and established that tract as Block No. 1. That made a block 440 yards by 880 yards and that was Block No. 1 to W. H. Rogers."

Counsel for Complainant:

"Of course nothing in the field notes indicated that, and we object for the reasons stated."

The Court:

"I understand. Your objection and exception goes separately to all this character of testimony."

(Direct Examination Resumed.)

Counsel for Defendants:

"Mr. Simmons then came back and started to surveying off Block No. 2, which was the J. F. Rog.rs tract. He came back to the North line and ran over 440 yards for the 80 acre marker and he said 'Boys, you have got a chain here left over there, and my two oldest brothers said: 'We will just keep that like it is.' We were using that for a road at that time of year. We had sold the mill but the road was still there. That is at the Northwest corner.

He drove his stake right at 440 yards and then he went South 880 yards. He came down to the half way point and

drove a stake in the ground there. He just put in a small piece of green pine temporarily at that point. He then went over and surveyed out the old home place for myself and my brother, J. W. He got that all into field notes and went home. The old man was old, and it was several days before he wrote up the deeds, then, when he delivered the deeds, we carried them to W. E. Foshee, a Notary Public in Gladewater, and signed them up. My older brother, John, and myself were single; and the other two boys were married. They had homes on those blocks and we were single; and we just blocked ours together.

We two single boys took the South end. That stake that Mr. Simmons drove at the Southwest corner of the J. F. Rogers tract and the Northwest corner of mine and my brother's tract was where the old gear wheel is now.

294 Q. Here is the gear wheel right here.

Counsel for Complainant:

"We object to all those stakes, and the gear wheel, as not being called for in any instrument."

The Court:

"Yes. Objection overruled, and exception allowed to all such testimony."

"I do not know what became of that stake that was placed there by Mr. Simmons at the time he made the survey. There is a pinion shaft out of an old sawmill there now.

VI.

The Court erred in making and entering the following conclusions of law:

"4. The Court concludes that extrinsic evidence was admissible to show that the surveyor Simmons, at the

time he made the partition survey, placed a stake at a point 880 yards west of the northeast corner of the said Thomason Survey for the northwest corner of the J. F. Rogers tract, and another stake 880 yards south thereof at a point now, and for more than 30 years, located by the old gear wheel. Also, extrinsic evidence was admissible to prove that one of the stakes was removed and the gear shaft placed where said stake was originally driven, as the Court concludes that the correction lease obtained either does not cover the 66 feet involved in this controversy or it takes in more land than it was represented to cover at the time it was obtained."

For the reasons set forth in Complainant's objections and exceptions to the findings of fact and conclusions of law paragraph 3, Section VIII, as follows:

"(3) Complainant being an innocent purchaser under a chain of transfers calling for the Wiley Davis Northeast corner was entitled to rely upon said call for adjoinder and parol testimony was not admissible against it to show that the call for the Wiley Davis Northeast corner was inserted through a mistake of the Rogers' heirs. Complainant was entitled to rely upon the presumption of law that where owners executed partition deeds they intended to partition all the land and not leave small, irregularly shaped tracts unpartitioned and was further entitled to rely upon the presumption that the parties intended to partition the whole tract of land because there was no express exception of said 66 foot strip. There was no testimony introduced showing that Complainant knew that the distance of the North line called for in the partition deed would not reach the Wiley Davis Northeast corner."

VII.

The Court erred in entering the decree filed herein after making a finding of fact that at the time Mrs. L. J. Rogers,

widow of J. F. Rogers, and her children executed and delivered to W. P. Chandler the oil and gas lease held by Complainant, the fee simple title to said strip was owned by the heirs of Louisa Rogers, deceased, because
295 Mrs. L. J. Rogers and her children had inherited from J. F. Rogers the undivided one-fourth interest in the estate of Louisa Rogers, deceased and had inherited from J. W. Rogers, a deceased heir of Louisa Rogers, an undivided one-third of one-fourth of the estate of Louisa Rogers, deceased, and owned, according to the Court's own findings of fact an undivided one-third interest in and to said strip of land at the time said lessors, Mrs. L. J. Rogers and her children delivered said oil and gas lease to W. P. Chandler, which lease contained the clause: "it being the intention to include all land owned or claimed by lessor in said survey." It therefore appears that it was the clear intention of the lessors to convey to the said W. P. Chandler all their interest in the G. A. Thomason Survey which, under the Court's findings would have included an undivided one-third interest in said strip of land.

VIII.

The Court erred in making and entering conclusions of law Nos. 1 and 3, whereby the Court concluded in substance that Complainant's oil and gas lease did not constitute a cloud on the title of defendant to said 66 foot strip and defendant Dunlap was entitled to have his title to said strip quieted as against Complainant on his affirmative relief for the reasons set forth in Complainant's objections to the conclusions of law under Section VIII paragraph 4 said objections being in substance that even though the partition deed to J. F. Rogers did not cover and include said 66 foot strip, the lessors in the W. P. Chandler lease owned by inheritance from W. H. Rogers and J. F. Rogers, heirs of Louisa Rogers, deceased, an undivided one-third interest in said strip and title to

said undivided one-third interest passed under said lease to W. P. Chandler because of the clause that it was the intention to include all land owned or claimed in said survey.

296 IX.

The Court erred in making and entering findings of fact No. 7 as follows:

"J. H. Simmons, in making the survey for W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers, prior to the execution of said deeds, began at the northeast corner of said G. A. Thomason Survey and measured west along the north line of said Thomason Survey a distance of 440 yards, set a stake and then measured south a distance of 880 yards, and then measured east a distance of 440 yards. From this work on the ground J. H. Simmons prepared the description contained in the deed from the three brothers to W. H. Rogers, covering tract No. 1 of 75-4/5 acres.

In making a survey on the ground for tract No. 2 J. H. Simmons began on the north line of the Thomason Survey at a point 440 yards west of the northeast corner of said survey, being at the point he had determined as the northwest corner of tract No. 1, and ran a line west along the north line of said Thomason Survey a distance of 440 yards and there set a stake for the northwest corner of Lot No. 2, and told the four Rogers boys, who were accompanying him on the survey, that there was a chain left between the point where he had stopped and set the stake, after measuring 880 yards from the northeast corner of said Thomason Survey and the northwest corner of their land, after measuring 880 yards from the northeast corner of the survey it was about one chain (66 feet) to the northwest corner of their land, which corner, from a fair inference from the evidence, was the northeast corner of the Wiley Davis land, though

the surveyor Simmons did not mention the Davis corner to the Rogers boys at the time of the survey; neither did he survey to said corner; nor did he endeavor to locate said corner at the time he was making the partition for the Rogers boys. The four Rogers boys, viz., W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers, who were with said J. H. Simmons, informed him that they would leave the 66 feet out of the partition and use the same jointly and keep it like it was; the same 66 foot tract was then being used in part as a logging road.

At the time of the partition, the east one-half of the Thomason Survey "was rated at 320 acres", and when Mr. Simmons was employed to make the survey, he was told by F. E. Rogers that the four Rogers boys, who were the owners, wanted him to divide the land into four 80-acre blocks. After J. H. Simmons set the stake for the northwest corner of tract No. 2 at a distance of 880 yards from the northeast corner of the Thomason Survey, he measured South a distance of 880 yards and there set a stake, at a point now evidenced by the old gear wheel, placed there soon thereafter as a corner stake, where it has remained for more than thirty years. The deeds to partition the four 80-acre blocks for the heirs of Rogers were prepared from the survey made upon the ground by J. H. Simmons, though the south portion of the partition was from a calculation. The field notes were not prepared for several days after the survey was made upon the ground."

For the reasons set forth in Complainant's objections and exceptions to the findings of fact, paragraph 2 of Section I, as follows:

"(2) The finding is against the overwhelming weight and great preponderance of the credible testimony because the field notes in the handwriting of the surveyor introduced in evidence showed that the surveyor did not measure across the North line of the East one-half of said Thomason Survey but measured across the South line of

the North one-half of the East one-half of said
297 survey to the Bozeman line, which line was well known to the surveyor and was the East line of the West one-half of said survey."

X.

The Court erred in making and entering findings of fact No. 16, as follows:

"16. The Court finds that the call for the Wiley Davis northeast corner contained in the partition deed from W. H. Rogers and others to J. F. Rogers, dated February 28, 1899, was inserted through mistake, and the Surveyor set a stake 880 yards west of the northeast corner of said Thomason Survey, and another stake south at 880 yards where the gear shaft now stands, to mark the west line of the J. F. Rogers tract, although the partition deed did not call for said two stakes. The Court finds that the stake set by Simmons on the north line 880 yards from the northeast corner disappeared prior to the trial of this cause."

For the reasons set forth in Complainant's objections and exceptions to the findings of fact, paragraph 2 of Section V, as follows:

"(2) The finding is against the overwhelming weight and great preponderance of the credible testimony because the field notes in the handwriting of the surveyor introduced in evidence showed that the surveyor did not measure across the North line of the East one-half of said Thomason Survey but measured across the South line of the North one-half of the East one-half of said survey to the Bozeman line, which line was well known to the surveyor and was the East line of the West one-half of said survey; and there was no evidence of a mistake in inserting the call for the Wiley Davis Northeast corner."

XI.

The Court erred in making and entering the last paragraph of findings of fact No. 13 as follows:

"The northwest corner of the W. H. Rogers tract No. 1, referred to as being at the Northeast corner of Lot No. 2 in the correction lease given by the heirs of J. F. Rogers to the Empire Gas & Fuel Company, Complainant, was located at a point 440 yards west of the northeast corner of the G. A. Thomason Headright Survey No. 175."

For the reasons set forth in Complainant's objections and exceptions to the findings of fact and conclusions of law, Section III, as follows:

"Complainant objects and excepts to the last paragraph of section 13 of the Court's findings of fact because the said finding is not supported by any competent and admissible testimony and is against the overwhelming weight and great preponderance of the credible testimony."

298 XII.

The Court erred in making and entering findings of fact No. 17, as follows:

"The Court finds that the oil and gas lease under which Respondent, B. P. Dunlap, claims, covers and includes such strip of land 66 feet wide and complainant's oil and gas lease, nor its purported corrected lease, do not cover said strip. The ratification or correction lease covers the same land as the original lease, the only difference being a change from yards to feet in the description, calls and a correction of an obvious error in one of the calls of the original lease. Such was the representation at the time the correction lease

was obtained, and such correction lease called to begin as follows: 'Being a part of the G. A. Thomason Headright, starting at the northeast corner of Lot No. 2, which is the northwest corner of the W. H. Rogers tract No. 1'; and the Court finds that the northwest corner of W. H. Rogers tract No. 1 was partitioned and surveyed at the time of the partition to be at a point 440 yards west of the northeast corner of the G. A. Thomason Headright Survey."

For the reasons set forth in Complainant's objections and exceptions to the findings of fact and conclusions of law, Section VI, as follows:

"Complainant objects and excepts to all of section 17 because the finding is not supported by competent evidence and is against the great weight of credible testimony."

XIII.

The Court erred in making and entering that part of the findings of fact No. 7 wherein the Court found that the 66 foot strip was being used in part as a logging road, for the reasons set forth in Complainant's objections and exceptions to the Courts findings of fact and conclusions of law, paragraph 5, Section I, which are as follows:

"The finding that the 66 foot strip was being used in part as a logging road is unsupported by any competent testimony because all the testimony showed that the 66 foot strip was being used for a road."

XIV.

The Court erred in overruling Complainant's motion to dismiss defendants' cross-action, said motion being as follows:

"(a) The allegations contained in the cross-action are insufficient in equity to state any cause of action against Complainant;

(b) The allegations are vague, uncertain and indefinite and do not apprise Complainant of what the said defendants expect to prove thereby;

299 (c) The allegations contained in said cross-action are repugnant, conflicting, and mutually destroy each other, and are in the alternative contrary to the Rules of Equity;

(d) Said allegations are argumentative and conclusions of law and no specific fact is stated showing that, in equity, said defendants are entitled to the relief for which they pray;

(e) The said allegations are insufficient in equity to allege or prove that the defendants ever owned title to the said land involved in said cross-action.

XV.

The Court erred in failing to find the facts as contained in Complainant's Requested Findings No. I as follows:

"The Court finds from the evidence introduced and the agreement of the parties made during the trial of this cause, that the tract of land conveyed and covered by the deed from Augustus Rogers to Louisa Rogers of September 6, 1882, is that portion of the G. A. Thomason Survey lying East of a line beginning 967 varas West of the Southeast corner of the Thomason Survey, and extending North to the Northeast corner of the M. O. Sheppard 36 acre tract and thence North, intersecting the North line of the said G. A. Thomason Survey at a point 982.4 varas West of the Northeast corner of said survey. The Court

further finds that the field notes as located on the ground and the boundaries of the tract of land conveyed to Louisa Rogers aforesaid covered and included the 66 foot strip of land involved in this controversy, it being the intention of the grantor in said deed to convey the East one-half of said G. A. Thomason Survey and it further being agreed between the parties to this lawsuit that the East one-half was separated from the West one-half by a line running from a point 967 varas West of the Southeast corner of the Thomason Survey North to the Northeast corner of the M. O. Sheppard 36 acre tract and thence North intersecting the North line of said Thomason Survey at a point 982.4 varas West of the Northeast corner of said survey."

For the reason that such facts are supported by competent evidence, and there is a total absence of competent evidence to support a contrary finding. The Court overruled said request and Complainant excepted as shown by the order filed herein.

XVI.

The Court erred in failing to find the facts as contained in Complainant's Requested Finding No. V as follows:

"The Court finds that on February 28, 1899, W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers intended to divide and partition all of the land they owned in the Thomason Survey by inheritance from their mother, Louisa Rogers, and said heirs owned said 66 foot strip in controversy. The said heirs intended to partition to J. F. Rogers Tract No. 2, described in the deed from W. H. Rogers et al to J. F. Rogers, and purposely and intentionally inserted the call for the Wiley
300 Davis Northeast corner, and intended for the Northwest corner of said tract No. 2, partitioned to J. F. Rogers to be coincident with the Northeast corner

of the J. W. (Wiley) Davis tract of land. The said Rogers heirs further intended for the West line of said tract No. 2 and the East line of the J. W. Davis tract and the East line of the Bozeman tract to be conterminous, because they did not intend to leave unpartitioned the said 66 foot strip then and now being used as a road, said strip being situated along the West side of the tract they had inherited from their mother, Louisa Rogers, and a part of said tract of land owned by Louisa Rogers being covered and included in the field note description in her deed."

For the reason that such facts are supported by competent evidence, and there is a total absence of competent evidence to support a contrary finding. The Court overruled said request and Complainant excepted as shown by the order filed herein.

Wherefore, Empire Oil & Refining Company (whose corporate name is now Cities Service Oil Company), Complainant and the Appellant herein, prays that the decree in this cause be reversed and rendered or, in the alternative, reversed and remanded, with instructions to the Trial Court as to further proceedings therein, and for such other and further relief as may be just in the premises.

DAVID B. TRAMMELL,
CLAYTON L. ORN,
Attorneys for Appellant.

H. J. PATTERSON,
PHILLIPS, TRAMMELL, ESTES,
EDWARDS & ORN,
Of Counsel for Appellant.

Assignments of Errors, Filed June 15, 1938.

301 ORDER ALLOWING APPEAL.

(Title Omitted.)

On this day came Cities Service Oil Company, substitute Complainant in the above entitled and numbered cause, whose corporate name heretofore was Empire Oil & Refining Company, and who was substituted as Complainant in lieu of Empire Gas & Fuel Company, having heretofore filed herein its petition for appeal from the decree entered herein on the 30th day of April, A. D. 1938, and presented its petition for an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, New Orleans, Louisiana;

It appearing to the Court that said petition for appeal has been filed at the same term of Court at which the decree was entered herein and that the said term of Court is still open for the purpose of this appeal;

It is Ordered that an appeal to the United States Circuit Court of Appeals for the Fifth Circuit from said decree heretofore entered herein be and the same is hereby allowed and that a certified transcript of the record be forwarded to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana.

It is further Ordered that the appellant furnish a bond on appeal in the amount of $1,000.00, the same to operate as a costs bond only.

Entered this the 15th day of June, A. D. 1938.

RANDOLPH BRYANT,
Judge.

Filed June 15, 1938.

302 APPEAL BOND.

(Title Omitted.)

Know All Men By These Presents that we, Cities Service Oil Company, a corporation, as principal, and the others whose names are signed hereto as sureties, are held and firmly bound unto B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, Curtis M. Willock and J. B. Parker in the full and just sum of One Thousand Dollars ($1000.00), to be paid to the said B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, Curtis M. Willock and J. B. Parker, their heirs, executors, administrators, successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 15th day of June, A. D. 1938.

Whereas, lately, at the February Term of the United States District Court for the Eastern District of Texas, Tyler Division, in a suit pending in said Court between Cities Service Oil Company, substituted as Complainant, in lieu of Empire Gas & Fuel Company, and B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, Curtis M. Willock and J. B. Parker, defendants, cause numbered 803 in Equity, a decree was rendered against the said Cities Service Oil Company at the February Term of Court, in which decree the Court dismissed the bill of complaint

303 for want of equity and quieted B. P. Dunlap in his title to and possession of the land described in said decree on his cross-action filed herein, and the said Cities Service Oil Company has petitioned for and been allowed by the United States District Court for the Eastern District of Texas, Tyler Division, an appeal to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, and the defendants have signed stipulations waiving the issuance and service of citations and said stipulations and waivers have been filed herein;

Now, Therefore, the condition of this obligation is such that if the said Cities Service Oil Company shall prosecute said appeal to effect and pay all costs if it fails to make good its plea, then the above obligation to be void, else remain in full force and virtue.

CITIES SERVICE OIL COMPANY,
By CLAYTON L. ORN,
Its Attorney of Record; Principal.
SEABOARD SURETY COMPANY,
By B. F. ALLEN,
Attorney in Fact; Surety.

The Surety herein is acceptable on Federal bonds.

MARJORIE MINTON,
United States District Clerk,
By SUSIE KERR, Deputy.

Examined and approved this the 15th day of June, 1938.

RANDOLPH BRYANT,
Judge.

Filed June 15, 1938.

306 PRAECIPE AND ACKNOWLEDGMENT OF SERVICE.

(Title Omitted.)

To the Clerk of the United States District Court, for the Eastern District of Texas, Tyler Division:

Madam:

You will please prepare and incorporate in the transcript of record for filing forthwith in the Honorable Circuit Court of Appeals for the Fifth Circuit, a transcript of the record in the above cause containing the following papers:

1. Caption.

2. Bill of complaint of Empire Gas & Fuel Company, filed December 18, 1934.

3. Motion of defendant, B. P. Dunlap, to dismiss bill of complaint.

4. Motion of defendants, J. T. Brewer and wife, Garnett Brewer, B. F. Phillips, J. R. Bozeman and wife, Olga Bozeman, to dismiss bill of complaint.

5. Motion of defendants, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, J. E. Rogers, Ola Mae Rogers, Elvie (Rogers) Waskom and Azzie Waskom to dismiss bill of complaint.

6. Order of dismissal as to defendants J. T. Brewer and wife, Garnett Brewer, B. F. Phillips, J. R. Bozeman and wife, Olga Bozeman.

7. Waiver of subpoena and entering appearance of J. B. Parker and Curtis M. Willock.

8. Motion of Empire Gas & Fuel Company for leave to file amended bill of complaint.

9. Order granting Empire Gas & Fuel Company leave to file amended bill of complaint.

10. Empire Gas & Fuel Company's amended original bill of complaint, filed January 11, 1936.

11. Answer of defendants, B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband, Azzie Waskom, and cross-action filed January 27, 1936.

12. Complainant's replication to answer and cross-action of defendants.

13. Joint motion of Empire Gas & Fuel Company and Empire Oil & Refining Company to substitute Empire Oil & Refining as complainant.

14. Order substituting Empire Oil & Refining Company as complainant for Empire Gas & Fuel Company.

307 15. Decree entered and filed April 30, 1938.

16. Court's findings of fact and conclusions of law.

17. Complainant's objections and exceptions to Court's findings of fact and conclusions of law.

18. Complainant's request for additional findings of fact and conclusions of law.

19. Order of the Court overruling and denying complainant's request for additional findings of fact and conclusions of law.

20. Order of the Court overruling complainant's objections and exceptions to the Court's findings of fact and conclusions of law.

21. Motion of complainant to permit appeal in the name of Cities Service Oil Company.

22. Order of Court permitting complainant to appeal under name of Cities Service Oil Company.

23. Statement of the evidence, agreement of counsel settling statement of evidence and order of Court approving statement of evidence.

24. Petition for appeal.

25. Assignment of errors.

26. Order allowing appeal.

27. Appeal bond with approval thereon.

28. Waiver of citation on appeal by B. P. Dunlap, et al.

29. Waiver of citation on appeal by Curtis M. Willock, et al.

30. Praecipe of appellant with admission of service.

31. Clerk's certificate of record.

PHILLIPS, TRAMMELL, ESTES, EDWARDS & ORN,
Attorneys for Appellant, Cities Service Oil Company (Formerly Empire Oil & Refining Company).

The undersigned attorneys of record for the appellees acknowledge service of the foregoing praecipe.

B. P. DUNLAP, F. E. ROGERS, W. H. ROGERS, MRS. L. J. ROGERS, a Widow, J. E. ROGERS and Wife, OLA MAE ROGERS, ELVIE (ROGERS) WASKOM and Husband, AZZIE WASKOM,

By WYNNE & WYNNE,
Attorneys of Record.

J. B. PARKER and
CURTIS M. WILLOCK,

By CECIL N. COOK,
Attorney of Record.

Praecipe and Acknowledgment of Service. Filed June 22, 1938.

308 CLERK'S CERTIFICATE.

The United States of America,
Eastern District of Texas, ss.

I, MARJORIE MINTON, Clerk of the District Court of the United States, for the Eastern District of Texas, in the Fifth Circuit, do hereby certify that the foregoing is a full, true and correct copy and transcript of record of all papers called for in the praecipe in cause No. 803 Equity Empire Gas & Fuel Company (Cities Service Oil Company, formerly Empire Oil & Refining Company, Substitute Complainant), v. B. P. Dunlap, et al., as the same appears on file and of record in this office.

I further certify that said transcript of record embraces only such instruments and orders as are specified in the praecipe filed by the appellant.

Witness my official signature and the seal of said District Court, at office in the City of Tyler, Texas, this the 22 day of June, A. D. 1938.

MARJORIE MINTON, Clerk,
(Seal) By SUSIE KERR, Deputy.

Waivers of Citation omitted from the printed record, the originals thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:-

ARGUMENT AND SUBMISSION.

Extract from the Minutes of November 17, 1938.

CITIES SERVICE OIL COMPANY,

No. 8863 versus

B. P. DUNLAP, ET AL.

On this day this cause was called, and, after argument by Clayton L. Orn, Esq., for appellant, and William A. Wade, Esq., for appellees, was submitted to the Court.

OPINION OF THE COURT - FILED DECEMBER 8, 1938.

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IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

No. 8863

CITIES SERVICE OIL COMPANY,
Appellant,

versus

B. P. DUNLAP, ET AL.,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Texas,

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(December 8, 1938)

Before SIBLEY, HOLMES and McCORD, Circuit Judges.

SIBLEY, Circuit Judge: The appellant, Cities Service Company, is by assignment and succession the holder of a producing oil and gas lease on a tract of land in Gregg County, Texas, made in 1930 by the heirs of J. F. Rogers. In 1934 appellee B. P. Dunlap obtained a lease upon a narrow strip of land about 68 feet wide by 880 yards long along the west side of the J. F. Rogers tract (less two acres sold off at the northwest corner) from the heirs of J. F. Rogers and his three brothers, W. H. Rogers, F. E. Rogers and J. W. Rogers. The four Rogers brothers were the heirs of Lou-

isa Rogers, who owned a rectangular tract of about 320 acres. They in February, 1899, divided it by assigning to J. F. Rogers a tract in the northwest corner, to W. H. Rogers a tract in the northeast corner, while F. E. Rogers and J. W. Rogers together took the south portion. The lease made in 1934 to Dunlap rests on the theory that a strip of land 66 or 68 feet wide along the west side was left undivided in 1899.

The lease of 1934 was recorded, and appellant as the holder of the lease of 1930, claiming the strip to be within its lease, filed in the District Court a bill to remove the cloud on its title, making Dunlap and all the Rogers parties. The defendants denied the material allegations of the bill touching the west boundary of the J. F. Rogers land, and by cross-bill set up that a call in the deed to J. F. Rogers for the "Wiley Davis northeast corner" as the northwest corner of the J. F. Rogers tract was inserted by the draftsman through inadvertence and mistake, and that the course and distance in the deed were correct and located that corner about 66 feet east of the Wiley Davis corner, and that the strip thus left between the east side of the Davis land and the west side of the J. F. Rogers land was purposely left undivided to be controlled in common; and there was a prayer to quiet title in them and their lessee. In answer to the cross-bill the complainant denied these allegations and asserted that it and its predecessors in the lease were purchasers for value in good faith and without notice of the mistake in the J. F. Rogers deed. On full findings of fact the District Court held that the extrinsic evidence of what happened in the partition, and of the intention in locating the west line of the J. F. Rogers land, was admissible; that the strip in question was not a part of the tract set off to J. F. Rogers, but that his west line began at a point 880 yards west of the northeast corner of the original tract and went thence south to

a "gear shaft" corner, and that the reference to Wiley Davis' corner was inserted in the deed by mistake. The title was accordingly quieted in the defendants. There was no express finding as to whether the complainant or its predecessors, or any of them, was a *bona fide* purchaser for value without notice. This appeal followed.

The principal questions made are: That the parol extrinsic evidence was not admissible; that the call for the Davis corner overrules the course and distance which fell short of it; that if that call be ignored the tract was nevertheless one adjoining a road, and by legal construction would include the land under the road; that the mistake, if any, was not correctible against *bona fide* purchasers; and that if all these contentions fail, still the one-fourth interest of the J. F. Rogers heirs in the strip should be held affected by appellant's lease. Appellant has a second lease made after a resurvey, and containing a differently worded description, but it was executed on the assurance that it covered nothing that was not covered by the first lease, and we agree with the ruling made below that it ought to be given no different effect.

The first lease copied exactly the calls of the partition deed to J. F. Rogers, as follows: "Being a part of the G. A. Thomas HR; starting at the N. E. corner of Lot No. 2, which is the N. W. corner of W. H. Rogers' tract, Lot No. 1, running west 440 yards to Wiley Davis' N. E. corner; thence south 880 yards; thence east 224 yards; thence north 310 yards at 12° east of north; thence east 754 yards; to W. H. Rogers' line; thence north 574 yards to the starting point; containing 68-1/5 acres more or less." On its face this survey is out of balance. The total west measurement is 440 yards. The east measurements are 224 and 574 yards, a total of 798 yards beside the easterly gain in the

line which runs 310 yards 12° east of north. All agree that the partition deeds, which are of the same date and between the same parties, recite the same consideration, and each in form a warranty deed to the grantee from the other tenants in common and duly recorded, are to be construed together as one transaction. Comparing them, it appears that the east and west line set down in the deed to J. F. Rogers as 754 yards long continues as a part of the south boundary of Lot No. 1 for 66 yards further. This entire line appears in the deed to the F. E. and J. W. Rogers part as 220 yards long, showing that 754 is a clerical error for 154, because 154 plus 66 makes 220 yards. Thus corrected, the J. F. Rogers east and west measurements approximately balance. They also work out correctly on the land. The northeast corner of the original tract is known, and is the northeast corner of Lot No. 1. The northwest corner of Lot No. 1 is by the deed to W. H. Rogers fixed 440 yards to the west, and was in 1930 a marked corner. That is the northeast corner of Lot No. 2, the J. F. Rogers tract, and the beginning and ending point for the calls in the deed to him. The northwest corner (ignoring the Wiley Davis corner) is called for as 440 yards to the west. Thence the course is south 880 chains, the deed mentioning no marker there but there being at this point a heavy iron shaft with a beveled gear on it planted, as is testified, soon after the survey to mark the corner, and it has been reputed to be the corner ever since. The courses and distances following thence, after the correction of 754 to 154 yards, reach the west line of Lot No. 2 and proceed along it to the beginning with fair accuracy. On the other hand, if the north line of Lot No. 2 is not stopped at 440 yards but is continued about 66 feet to Wiley Davis' N. E. corner, which was a known point in 1899 and ever since, and if the survey is continued thence, the bev-

eled gear shaft will be missed at the southwest corner by 66 feet, the west lines of Lot No. 1 will not be reached by that distance, nor will the beginning point be.

In the effort to include just the land the parties intended, which is the true object in all questions of boundary, shall the measurement of 440 yards for the north line prevail, or shall the call for Wiley Davis' northeast corner control? The appellant correctly contends that there is a presumption that the parties intended to divide all their land and especially not to leave a narrow strip off to one side; and that it is a general rule that courses and distances, because of the greater possibility of error in them, will yield to a call for a fixed monument, including the line or corner of an adjoiner. *Camp vs. Gulf Producing Co.*, 122 Tex. 383, 61 S. W. (2) 773; *Goodson vs. Fitzgerald*, 135 S. W. 696; 8 Am. Jur., Boundaries, §51, 53, 56. But the presumption stated is rebuttable; and the rule not without exceptions. It sometimes appears that the measurements are more likely correct than the call for some monument or adjoiner, or that such call was inserted by error; and when that is clearly true the mistaken call will be rejected and the measurements followed even in cases at law. *White vs. Luning*, 93 U. S., 514; *State vs. Sullivan*, ... Tex. ....., 92 S. W. (2) 228; *Wilson vs. Giraud*, 111 Tex. 253, 231 S. W. 1074; *Coswell vs. Foulk*, 97 S. W. (2) 341, (error refused); *Humble Oil Co. vs. State*, 104 S. W. (2) 174, (error refused); 8 Am. Jur., Boundaries, §52. In the present case the scope of the admissible evidence is enlarged by the pleaded issue that the reference to the Wiley Davis corner got into the deed through mistake. On that issue, the case being in equity, parol and other extrinsic evidence of what was done and said was plainly admissible. The court properly heard the testimony of persons who were present at the survey, and it clearly showed that the northwest corner of

Lot No. 2 was deliberately and purposely put about a chain's length east of the Wiley Davis corner so as to leave a strip undivided and under the control of all four tenants in common for the purpose of a road. The planting of the heavy gear shaft at the same distance from the Davis line at the south end powerfully sustains this testimony. Most evidently it marked a permanent corner. The evidence was admissible, and it well warranted the finding of the judge that the reference to the Wiley Davis corner as the corner of Lot No. 2 was inserted by mistake in drafting the deed. Appellant argues that the field notes of the survey contradict the witnesses as to where the surveyor went and how he located the corners of Lot No. 2. It so happens that the field notes of Lot No. 2 have not been found. Those for the other lots do not show the surveyor at or near the Wiley Davis corner, or measuring the north line 440 yards or any other length, for this line was not common to the other lots. Only the field notes for Lot No. 2 would show what was done at or near the northwest corner of that lot. There is no contradiction of the witnesses by the field notes introduced.

But appellant argues that equity will not correct a mistake as against a bona fide purchaser for value without notice, and that there is no proof that it and its predecessors in the lease were not such. The answer is that there is no sufficient proof that they were. In the law of negotiable instruments presumptions are indulged as to bona fides and want of notice, but in equity a claim to the favored position of a bona fide purchaser for value without notice is a matter of affirmative defense, and he who asserts it has the burden of proving it. Compare *United States vs. California & Oregon Land Co.*, 148 U. S. 31. It fairly appears that these lessees paid value in developing the lease, but there is no evidence at all that at the time

they paid they did not know that the west line was not the east line of Davis, or that the call for 440 yards on the north line would not reach Davis' corner, rendering the corner questionable. No well was drilled or expenditures made on this disputed strip. There being no proof of bona fides or want of notice, this plea was not sustained. The district judge held the evidence touching the intention of the parties to be admissible on the ground that the deed was ambiguous irrespective of the equitable power to correct a mistake in the deed. The cases cited above go far to sustain him, but we find it unnecessary to determine that question in view of the equitable issues pleaded.

Appellant strongly argues that although it be established that the call for the Wiley Davis corner does not belong in the deed, under settled rules of law the conveying of the land adjoining a road will carry the grantor's title to the servient fee up to the center of the road, and if the grantor has no land beyond the road the grantor's title to its further edge will pass. Such is the general rule applied both to highways and streets and alleys, non-navigable streams and railroad rights-of-way. 8 Am. Jur., Boundaries, §36, 39, 22, 25; 11 C. J. S., Boundaries, §31, 35, 45. It is based on the presumed intention of the parties that the grantor would not reserve a long, narrow strip under such way or stream for which he had no use, and partly on public policy in that such strips are likely to give rise to litigation in the distant future. But it is not unlawful to retain such a strip. If the intention to do so is clear, the contrary presumption must yield. And if the conveyance as made does not reach the highway or stream, it cannot be extended to it to avoid creating a separately owned strip. There was in 1899 no highway or street or alley covering the strip in question. A highway ran east and west through the land to be partitioned near its center. The Rogers brothers had

run a sawmill on their land, and had hauled logs along the line of Davis to this highway. It was not a publicly worked way, or an established road. About this time, the date not being clearly fixed, Davis wished to confine the travel across his place, and he testifies he gave fifteen feet along the east edge of his land for a north and south road. Several witnesses say they helped cut the road out fifteen or twenty feet wide, cutting the line trees on the Davis line because they were in the road. The big pine at the Wiley Davis northeast corner was cut close to the ground and its stump was in the middle of the road. It was thereafter a country road open to all, although little used. The fences, where there were any, on either side were sixty or seventy feet apart, but not straight, and probably were not regarded as correct line fences. The land, as we understand, was mostly in woods. The actual road was thus only twenty feet wide, and supposed to be half on the land of Davis. Assuming it to have been in existence in 1899, the northwest and southwest corners which the surveyor fixed for Lot No. 2 were about sixty-six feet from the center of this road and fifty-six feet from its margin. Neither the deed nor the field notes say anything about a road. This is not a case in which a road is mentioned as a boundary, nor one in which the boundary fixed is in fact the edge of a road either public or private. The only thing that tends to make the strip in contest a road, or the equivalent of a road, is the parol evidence that the Rogers brothers during the survey informed the surveyor, as found by the court, that "They would leave the 66 feet out of the partition and use the same jointly, and keep it like it was; the same 66 foot tract was then being used *in part* as a logging road." There was no covenant to dedicate the strip to the public as a road. It was subjected to no easement over the whole of it so as to convert the whole strip into a roadway. There is a plainly expressed intention not to

add the strip to Lot No. 2 but to retain joint control and ownership of it. Since the deed as prepared said nothing about a road as a boundary, there was no occasion to make a reservation of the land, though to some extent on its far edge it was used for a road. The case presented is not one requiring an extension of the deed beyond its true calls. In recent years a broad public road occupying most of the strip has been laid out, but this development years after the making of the deed cannot have the effect of extending its scope. 11 C. J. S., Boundaries, §35, (4).

Appellant lastly contends that its lessors at the date of its lease owned in any event a fourth interest in the strip, and it is covered by the lease because of the words in it which follow the description first above quoted: "and being the same land described in a deed from J. W. Rogers, W. H. Rogers and F. E. Rogers, February 28, 1899, Recorded Vol. R, pages 59-60, Deed Records Gregg County, Texas, save and except two acres out of the northwest corner sold to R. M. Wood, it being the intention to *include all land owned or claimed by lessor in said surveys.*" In the correctional lease the singular number is used: "Said survey". The only survey definitely mentioned consists of the courses and distances just before recited. The reference to the recorded deed to J. F. Rogers imports its contents into the lease, and there is a similar "survey" in it. The "intention clause" if applied to these adds nothing to the lease. It is, however, attempted to make it refer to the original grant to G. A. Thompson (Thomas is the name used in the lease) which contained 640 acres, but the lease does not mention any survey in that connection. The uncertainty is too great to warrant any application of this clause to land outside the limits of the surveys which are definitely set forth. Furthermore, if other land can be included under this clause the original lessee's interest in it

was not transferred to the appellant, for his deed of assignment recites the description of the J. F. Rogers deed as above quoted, omitting the "intention clause", and then transfers "all rights, title and interest of the original lessee and present owner in and to said lease and rights thereunder *in so far as it covers the above described tract.*" If the lease covered any additional land, the original lessee did not transfer his interest therein.

JUDGMENT AFFIRMED.

~~A true copy:~~
~~Test:~~

~~Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.~~

JUDGMENT.

Extract from the Minutes of December 8, 1938.

CITIES SERVICE OIL COMPANY,

No. 8863 versus

B. P. DUNLAP, ET AL.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed;

It is further ordered, adjudged and decreed that the appellant, Cities Service Oil Company, and the surety on the appeal bond herein, Seaboard Surety Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

PETITION FOR REHEARING - FILED DECEMBER 27, 1938.

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IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

CITIES SERVICE OIL COMPANY, Appellant
v.
B. P. DUNLAP, ET AL., Appellees
No. 8863

Appeal from the District Court of the United States for the Eastern District of Texas

Appellant's Motion For Rehearing

To the Honorable Circuit Court of Appeals for the Fifth Circuit:

Cities Service Oil Company, Appellant, respectfully shows to the court that in its opinion and judgment heretofore delivered and rendered on December 8, 1938, this Honorable Court erred, to Appellant's prejudice, in the following particulars:

I.

This Court erred in holding "there was in 1899 no highway or street or alley covering the strip in question" since appellees pleaded that the strip was left open for a road, and F. E. Rogers, who assisted in the survey, testified that they were using the road at the time.

In our Reply Brief at pages 3 to 5, the pleadings of the appellees are quoted, from which it appears that in Paragraph X it was expressly alleged "*that the line was stopped at 440 yards west of the northwest corner of Lot 1, purposely so that the original Rogers owners could at all times have an outlet from the north to the main public road leading from Gladewater,*" and again in Paragraph XI that "*the Rogers family desiring to leave a strip on the west side for an open roadway had said land surveyed as above alleged, to begin at the northeast corner of the survey; thence to run west 880 yards for Lots 1 and 2; thence south 880 yards to corner marked by an old gearwheel*"; and again that the "*northwest corner as established on the ground and the southwest corner as established on the ground being established at a point 68 ft. east of the line claimed by the plaintiff in plaintiff's amended bill of complaint,* **this being left out by the surveyor at the request of the Rogers family for a road to be jointly owned and controlled by the parties to the said partition.**" (R. pp. 34-35.)

F. E. ROGERS testified that when Simmons, the surveyor, started surveying off Lot No. 2, the J. F. Rogers tract, he came back to the north line and ran over 440 yards and said to them that there was a chain left over there, whereupon his brothers remarked that they would keep that just like it was. **"We were using that for a road at that time of year. We had sold the mill but the road was still there."** (R. p. 222.) Again, F. E. ROGERS testified:

"Since the division between the heirs and the establishment of the 440 yard corner at the North and the establishment at the corner where the gear wheel is located, **a road has been open for the use of anyone who wanted to travel it.**" (R. pp. 223-4.)

In view of this pleading and testimony, the ruling of the court is clearly erroneous.

II.

This Court erred in holding that "since the deed as prepared said nothing about a road as a boundary, there was no occasion to make a reservation of the land, though to some extent on its far edge it was used for a road," the rule being, as well established by both State and Federal authorities, that it is not the call for the road, but the fact that the tract is bounded by a road, that makes applicable the rule of law that the fee to the roadway will pass by conveyance of the adjoining tract unless expressly reserved.

In *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 88 A. L. R. 391, and also in *Texas Bitulithic Co. v. Warwick* (Tex. Com. App.), 293 S. W. 160, the rule announced in 9 *C. J.*, p. 200, was approved as follows:

"The presumption of an intent to convey title to the center of a street or highway is not overcome by the fact that the land is described by metes and bounds, and that the distances

stated in the description of the deed do not extend to the center of the street."

III.

This Court erred in holding that the presumption of law that the strip in controversy passed to J. F. Rogers by the deed to the adjoining tract could be rebutted by parol testimony, it being the rule established by applicable Texas authorities that such presumption is conclusive unless rebutted by appropriate language of the deed itself.

In *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448, the court approves the rule set forth in 9 *C. J.* 195, Section 83, viz:

"It is the established rule that a conveyance of land bounded on a street or highway carries with it the fee to the center thereof, subject to the easement of public way, provided the grantor at the time owned to the center **and there are no words of specific description to show a contrary intent.**"

So, in *Mitchell v. Bass*, 26 Tex. 372, the court said:

"The established doctrine of the common law is, that a conveyance of land bounded on a public highway, carries with it the fee to the centre of the road, as part and parcel of the grant. **Such is the legal construction of the grant, unless the inference that it was so in-**

tended, is rebutted by the express terms of the grant." (p. 380.)

This case was followed by *Texas Bitulithic Co. v. Warwick*, 293 S. W. 160, by the Texas Commission of Appeals, and also by *Rio Bravo Oil Co. v. Weed*, supra. To the same effect is *Roxana Petroleum Corp. v. Sutter*, 28 F. (2d) 159, by the Eighth Circuit, where the court held that the servient estate passes "*unless the intention not to do so be clearly indicated.*"

The strip being, under the pleadings of appellees and the theory of the trial court, left for a roadway, it would be immaterial whether it was ever opened or not. In *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448, it was said that: **"And it is also immaterial so far as the title is concerned that the road was never opened or that it was abandoned."** *Amerman v. M. K. & T. Ry. Co.*, 182 S. W. 54, was cited as sustaining the proposition. There, in partition of land among heirs, a tract was platted reserving a strip for a street, but the street was never opened and the city afterwards abandoned its rights therein by ordinance. It was held that the rights of the distributees were not dependent upon the acceptance by the public of the dedication or the abandonment of the street by the city. And in *Paine v. Consumers Forwarding & Storage Co.*, 71 F. 626, by Judge Taft while he was on the Circuit Court of Appeals, it was said:

"First, it is said that the principle is never applied except when there is an actual public highway forming a visible monument. The case of Hopkinson v. McKnight, 31 N. J. Law, 427, is relied upon to sustain this proposition. **The weight of authority is, however, decidedly to the contrary.** *In the case of Stark and Wales v. Coffin, 105 Mass. 328, it was held that a deed conveying part of a tract of land as bounded 'by a passageway of fifteen feet wide,' leading across the tract, with no restriction or controlling words, passes the fee to the center of the way so assumed as a monument, although no such way existed at the date of the deed, or has ever been fenced off, and although the deed provided that the passageway was to be held in common forever by the parties to the deed."* (71 F. 630.)

IV.

This Court erred in denying appellant's plea of innocent purchaser because of a want of proof of bona fides and lack of notice, and in holding that the burden of proof was on appellant, for the reason that under controlling Texas decisions, appellant was the holder of the legal title, the Rogers having at most only the equitable title, and it was incumbent upon appellees to prove either notice to appellant or that it was not a purchaser for value.

J. H. Simmons, the surveyor, knew where the Wiley Davis corner was located because he had run out the Bozeman partition of the west half of the

Thomason Survey in 1891, but a short time before (R. pp. 191-193). F. E. Rogers, one of the appellees, who accompanied Simmons when he partitioned the Rogers land, knew where the pine tree marking Davis' corner was, and also where Davis' east line was, testifying that there were marked trees along Davis' east line and their west line, which were cut down when he built the road (R. pp. 225-226). So that it is clear that there was no mistake as to where the north line of the tract in controversy, calling for the Wiley Davis northeast corner, would stop. The deed therefore passed to appellant's predecessor in title, the legal title to the strip in question. *Swann v. Mills*, 219 S. W. 850, by the Texas Court of Civil Appeals. This case is directly in point and holds that the legal title passed.

It was necessary therefore for appellees as the holders at most of the equitable title to prove want of notice or lack of consideration paid. The case of *Teagarden v. Godley Lumber Co.*, 105 Tex. 616, 154 S. W. 973, was cited in our brief (p. 137). The rule is thus tersely stated in the late case of *White v. Hix*, 104 S. W. (2d) 136:

> *"It is thoroughly settled that one who claims a superior equitable title to land as against one who has purchased from the holder of the legal title must show that such purchaser did not purchase for value or purchased with notice of the outstanding equity.* Teagarden v. R. B. Godley Lumber Co., 105 Tex. 616, 154 S. W.

973; Commonwealth B. & L. Ass'n v. Howard (Tex. Civ. App.), 61 S. W. (2d) 546; Moore v. Humble Oil & Ref. Co. (Tex. Civ. App.), 85 S. W. (2d) 943, 944; Tarkenton v. Marshall (Tex. Civ. App.), 91 S. W. (2d) 473. The same rule applies in favor of lien holders. Texas Loan Agency v. Taylor, 88 Tex. 47, 29 S. W. 1057; McAlpine v. Burnett, 23 Tex. 649, 650." (pp. 139-40.)

These decisions are binding on the United States Courts. See *Mason v. United States*, 260 U. S. 545, 67 L. Ed. 396, a suit in equity, and *Erie Railroad Co. v. Tompkins*, 82 L. Ed. (Adv. Ops.) 787, a suit at law.

Therefore, *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69, is directly in point and controlling. This decision clearly confers upon appellant the status of an innocent purchaser, and this Court therefore erred in not so holding.

V.

This Court erred in holding appellant's defense of innocent purchaser unavailing for want of proof, since appellant's allegations that it was such bona fide purchaser without notice were not denied and therefore it was not incumbent upon appellant to support same by proof.

The answer of defendants contained a cross action (R. pp. 37-43), to which appellant, plaintiff

below, duly made replication as required by Equity Rule No. 30. (R. pp. 43-48.) In Paragraph IV thereof appearing on page 45 of the Records it was distinctly alleged:

"* * * Complainant avers that it and its predecessors in title purchased in good faith, paying a valuable consideration therefor, the oil and gas lease which it now owns and holds, relying upon the call in the deed and oil and gas lease for the Wiley Davis Northeast corner as marking and fixing the Northwest corner of the tract of land conveyed by J. W. Rogers and others to F. E. Rogers, and without any knowledge or notice of the claims now asserted by defendants to the strip of land described in the purported oil and gas lease from F. E. Rogers, et al, to B. P. Dunlap and without any notice or knowledge that the call from the Wiley Davis Northeast corner was inserted by mistake in the deeds and oil and gas lease (if such call was inserted through mistake, which Complainant does not admit but denies)."

These allegations were not denied.

VI.

There being no proof showing that W. B. Chandler, appellant's immediate vendor, did not purchase for value and without notice, appellant's defense of innocent purchaser under Chandler should have been sustained, the burden being upon appellees to show notice or failure to pay value, the legal title passing to Chandler under his oil and gas lease, under the authorities above cited.

VII.

Under Appellees' testimony and theory, the strip in controversy was left for a road in the partition of 1899, and at all events title passed to J. F. Rogers under his deed, it being settled law that conveyance of land bounded by a road carries title to the grantor's interest in the road, subject to the easement of roadway, unless expressly reserved.

The testimony of F. E. Rogers was that when they ran the north line of the J. F. Rogers tract and came to the end of 440 yards, Simmons said to the boys that they had a chain left over there and "my two oldest brothers said: 'we will just keep that like it is.' *We were using that for a road at that time of year. We had sold the mill but the road was still there.*" (R. p. 222.) This makes the Texas case of *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448, directly controlling. There in par-

tition in the District Court of Gregg County, the decree described Lot No. 5 by metes and bounds as keeping 30 feet from Lot No. 2 as a road reservation. A road was never established on the strip. The purchaser of the lot conveyed and it was held that such conveyance, although by metes and bounds, conveyed title to the road reservation. The Court cited *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391, and said that:

> "* * * And it is also immaterial, so far as the title is concerned, that the road was never opened or that it was abandoned."

In the *Weed Case* lots were laid out abutting on the railway right-of-way, and it was held that the right-of-way passed by conveyances of the lots. The authorities in Texas hold that title to the road passes unless expressly reserved or excepted in the deed. *Mitchell v. Bass*, 26 Tex. 372; *Texas Bitulithic Co. v. Warwick*, 293 S. W. 160; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. 1080, 85 A. L. R. 391. In the latter case it was said that:

> "In other words, when a person conveys a piece of property abutting upon a public highway or non-navigable stream it is but natural to assume, in the absence of an express reservation to the contrary, that he intends to convey the same with all of the beneficial rights enjoyed by him in its use." (p. 438.)

The intention on the part of the grantor to with-

hold his interest in the road or street, after parting with his interest in the abutting land, is never to be presumed. *Wiess v. Goodhue*, 102 S. W. 793, writ refused.

VIII.

The Court erred in holding that parol evidence was admissible to show that the grantors in the deed to J. F. Rogers intended to reserve the strip in controversy as a roadway, it being the Texas rule that such testimony is inadmissible in the absence of a reservation in the deed (Gulf Production Co. v. Warren, 99 S. W. (2d) 616, writ refused), and such decisions being binding on the Federal Courts under the cases of Mason v. United States, 260 U. S. 545, 558, 67 L. Ed. 396, 401, and Erie Railroad Co. v. Tompkins, 82 L. Ed. 787.

In the *Warren Case* the metes and bounds description extended to the inner edge of the right-of-way, and it was sought to show by parol that lessors showed the lessees the extent of the land leased which did not include the right-of-way. The Court held this inadmissible, saying:

> "But, for this additional, fundamental reason, this assignment is without merit. On the face of the lease made by appellee to appellants, by the very terms of that lease, by the use of language many times construed by the courts where the issue of title to the center of a way was under consideration—language of

identical import—appellants acquired title to the center of the right of way. The language of the lease was not ambiguous; its legal significance was perfectly clear; therefore, parol evidence to the effect that 'Mr. Cartwright, prior to the execution of the lease in question, went upon the ground and specifically pointed out the tract to be covered by the lease, which designation did not include the railroad right of way tract,' was not admissible, but if received, was without probative force in the construction of the lease. 18 C. J. 252. This rule was given controlling effect by the Commission of Appeals in the Rio Bravo Case." (p. 626.)

Refusal of a Writ of Error by the Supreme Court under our present statute had the effect of approving the opinion of the Court of Civil Appeals (Article 1728, 3 *Vernons' Rev. Stats. of 1925*, Pamphlet Supp.)

IX.

This Court erred in holding that the oral testimony of the witnesses as to the survey was not contradicted by the field notes introduced in evidence, such field notes showing that Simmons ran to the Bozeman line for the southwest corner of the J. F. Rogers tract, marking trees for corner, and did not stop at the point marked by the gear wheel.

Simmons, the surveyor, knew where the Bozeman east line which coincided with the Rogers west line,

was, since he had run out the Bozeman partition of the west half of the Thomason Survey in 1891, but a few years before the partition of the Rogers land (R. 191-193).

The field notes of the surveyor J. H. Simmons on page 266 of the Records show that he started at the northeast corner of the tract and ran south 880 yards to corner 2, witness a Red Oak. This is the southeast corner of Lot 1. He then ran west 440 yards to corner 3, witnessed by a pine stump "which is center of Rogers' tract; thence west 440 yards to corner 4 to Bozeman land pine S. 65° W. 6 L. and pine S 80° East 14 L; then come back to corner 3 center of tract and run north 880 yards to corner 5; pine N 40° E. 5½ L. and pine S. 32° W. 11 L," etc. This with the accompanying plat shows as we think that he surveyed from the northeast corner of the whole tract south 880 yards, then ran across to the Bozeman line where he calls for trees instead of a stake. It is to be noted that F. E. Rogers testified that when he went around with Simmons in making the survey that "when he went west from the southeast corner on the east line of the Thomason Survey 880 yards where I said he set the stake and the bevelled gear is now driven, he did not mark any trees. There were just little saplings there; he put down a stake and did not mark any trees." (R. pp. 262-263.)

There is but one conclusion to be drawn from these notes and the plat, it seems to us, and that is

that Simmons surveyed from the northeast corner south to the southeast corner of Lot 1, the W. H. Rogers Tract, and ran west to the Bozeman line, which he of course was familiar with, having run it out but a few years before, then came back as he says to corner 3 and ran north to the north line, and then ran east 440 yards to the starting point. He then, as shown by the notes on page 265, started again at corner 2, the southeast corner of the W. H. Rogers Tract No. 1 and ran west 374 yards, north 308 yards, west two calls of 66 and 154 yards, south 310 yards and west 224 yards to corner 4 where he again calls for the same pine witness trees that he had called for in Bozeman's land (R. p. 267) in his survey of Tract No. 1. It will be noted that he did not call for bearings at the southeast or southwest corners of the tract, the only bearing trees called for being at the northeast and southeast corner of Tract No. 1, corner No. 3, which would be the center of the tract; corner No. 4 on the Bozeman line and corner No. 5 at the northwest corner of Tract No. 1 and the northeast corner of the J. F. Rogers Tract No. 2. A reference to the plat on page 266 will make this clear and show all of the surveying that Simmons did. The call for the Bozeman line (or land) at corner No. 4 with bearing trees, is consistent with the calls for the Wiley Davis northeast corner, because such corner was an extension of the Bozeman line north.

X.

This Court erred in holding that the call for distance from the northwest corner of the W. H. Rogers tract No. One of 440 yards, should control, and not the call for the Wiley Davis northeast corner, since it clearly appears from the field notes introduced in evidence made by Simmons at the time of the survey that when he ran east on the south line of the J. F. Rogers tract No. Two he reached the Bozeman land which lay to the west of the Rogers land marking trees, such point being in a line extending north from the northeast corner of the Sheppard tract to the Wiley Davis northeast corner witnessed by a pine, and therefore the call for the northeast corner of the Davis land was not inserted by mistake.

As heretofore said, J. H. Simmons, the surveyor who partitioned the three Rogers' tracts, was familiar with the Bozeman land, having partitioned it in 1891 (R. pp. 191-193). Appellees' witness J. E. Sport was familiar with the Wiley Davis tract in 1892, and also the Bozeman and Rogers land. He testified that the pine tree witnessing the northeast corner of the Wiley Davis tract would be reached by extending the line from the Postoak tree at the southeast corner of the M. O. Sheppard 36 acre tract through the Redoak tree at the northeast corner of the tract on to the north line of the survey to the northeast corner of the Wiley Davis tract (R.

p. 238). The field notes (R. pp. 266-267) show that when Simmons ran west from the center of the Rogers tract he reached corner 4 "to Bozeman land pine S. 65° W. 6 L. and pine S. 80° E. 14 L." He made but five corners according to the plat accompanying such notes shown on page 266, one at the northeast corner of the whole tract, which also was the northeast corner of Tract No. 1; the second at the southeast corner of Tract No. 1; corner 3 at the center of the Rogers tract, which would have been the southwest corner of the W. H. Rogers Tract No. 1 had not the tongue of land been cut out as shown at the top of the page; corner No. 5 at the northeast corner of Tract No. 2, the J. F. Rogers tract, and the northwest corner of Tract No. 1, and Corner No. 4 in the Bozeman line. When he reached corner No. 4 in the Bozeman line, then he was south of the Wiley Davis corner and at the southwest corner of the 66 ft. strip in controversy.

The parol evidence relied upon by the court to show the existence of the strip is clearly in conflict with this written testimony of the surveyor, contained in the field notes made at the time, especially when it is noted that corner No. 4 was witnessed by pine trees, whereas Rogers' testimony, on which the court based its findings, was to the effect that there were "just little saplings there: he put down a stake and did not mark any trees." (R. pp. 262-263.)

It is to be remembered also that the bevelled gear is a second-hand corner, placed there by J. E.

Rogers and Seth Davis in 1905, six years after the partition was made. (R. pp. 256-257.) At this time J. E. Rogers was a boy. There was nothing there at the time other than a post or a stake (R. p. 234); and this evidence seems clearly to indicate the unreliability of such parol testimony, especially when contradicted by the record of the field notes of the surveyor in his own handwriting.

XI.

This Court erred in holding that the language in the corrected lease "being the intention of the lessor herein to lease all land owned by them in said survey" did not cover and include the interest of lessors in the strip of land in question, the "survey" referred to being clearly the G. A. Thomas (Thomason) Headright, the land particularly described in the correction lease being referred to as a "tract" and not as a survey.

The correction lease appears in the Record, pp. 162-168. It describes the land as a part of the G. A. Thomas Headright, starting at the northeast corner of Lot 2 and calling for directions and distances, and after reaching the point of beginning, continues: "Said tract to contain 66-1/5 acres, more or less. It being the intention of the Lessor herein to lease all land owned by them in said survey and containing 66-1/5 acres, more or less." (R. pp. 163-164.)

The reference to the land particularly described as a "tract" shows that when the word "survey" was used, it was used in its ordinary signification and referred to the Thomason Survey.

XII.

The Court erred in holding that all of the rights of W. P. Chandler did not pass to and vest in appellant, including the lease on the disputed strip, it being expressly alleged in plaintiff's petition that "by assignment and conveyance plaintiff became on October 21, 1930, the owner of said oil, gas and mineral leasehold estate" (R. p. 24), and the only denial thereof being a general denial contained in paragraph VI of the answer, which general denial was wholly insufficient to raise an issue.

In Paragraph IV on page 24, appellant alleged that "by assignment and conveyance plaintiff became on October 21, 1930, the owner of said oil, gas and mineral leasehold estate and immediately went into possession thereof," etc. To this defendants answered that (PG. VI, Record, p. 32): "The defendants deny the allegations of Paragraph IV of the amended bill, especially the allegations that plaintiff immediately went into possession," etc., following with specific denials of other matters contained in said paragraph.

XIII.

This Court erred in not giving effect to the unassailed finding of the court below to the effect that the W. P. Chandler lease was assigned to plaintiff and is now owned by it and is a valid and subsisting lease.

The Court's finding of fact No. 12 is as follows:

"On October 20, 1930, said heirs of J. F. Rogers executed an oil, gas and mineral lease to W. P. Chandler using the same description contained in the said deed from W. H. Rogers, et al, to J. F. Rogers, excepting said two (2) acre J. W. Mings tract last above described, and stating 'it being the intention to include all land owned or claimed by Lessors in said survey.' Said lease was assigned to Complainant, and is now owned by it and is a valid and subsisting lease."

Such finding was not excepted to, nor attacked in any manner, and appellees' contention for the first time on appeal that the assignment did not convey the whole lease clearly is an afterthought, not raised below and therefore not available here.

XIV.

This Court erred in holding that the assignment from W. P. Chandler to Empire Gas and Fuel Company did not convey the whole lease, the tract in controversy not being a separate and distinct tract, but (if not clearly included in the description contained in the lease and assignment) only a small strip left for purposes of a roadway, and actually used as such at the time of the partition and later.

It is respectfully urged that the assignment from Chandler to the Empire Gas and Fuel Company appearing at pages 172-174 was sufficient to assign to such company the entire lease. The tract in controversy was not separately described in the lease and had never so far as the proof to our mind indicates, been regarded as a separate and distinct tract. The Chandler assignment refers to the oil and gas lease, giving the names of the lessors and lessee, describes the only property described in the lease, assigns it to the Empire Gas and Fuel Company and covenants that he is the lawful owner of the lease and all rights and interest thereunder. Had two tracts been separately described in the lease, or had the tract in controversy been a separate and distinct parcel, another question might have been presented; it is apparent, however, that Chandler was attempting to assign all of his rights under the lease, and this Court erred in giving the assignment such a narrow interpretation, especially

in view of the finding of the trial court above referred, and the fact that no such contention was raised below.

XV.

This Court erred in affirming the judgment below and thus in effect reforming a deed executed over thirty-four years before the trial below as against appellant's contention that such relief was barred by laches and limitation.

CONCLUSION

WHEREFORE, it is respectfully prayed that the judgment of affirmance heretofore entered herein be set aside, and in lieu thereof a judgment of reversal be rendered that justice may be done.

Counsel for Appellees are Wynne and Wynne of Longview, Texas, and they have been mailed copy of this motion.

CLAYTON L. ORN,
DAVID B. TRAMMELL,
Attorneys for Appellant.

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Of Counsel for Appellant.

DAVID B. TRAMMELL, one of counsel preparing the foregoing motion, hereby certifies that such motion is made in good faith; that in his opinion there is good ground for the same and that it is not interposed for delay.

DAVID B. TRAMMELL.

NOTE:

The opinion of the Court on the Motion for Rehearing, filed January 23, 1939, was ordered withdrawn by the Court on February 24, 1939, for correction, and as corrected was filed on February 24, 1939.

ORDER DENYING REHEARING.

Extract from the Minutes of January 23, 1939.

CITIES SERVICE OIL COMPANY,

No. 8863 versus

B. P. DUNLAP, ET AL.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

APPELLANT'S MOTION FOR LEAVE TO FILE SECOND MOTION FOR REHEARING and SECOND MOTION FOR REHEARING ATTACHED THERETO - FILED FEBRUARY 7, 1939.

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IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

CITIES SERVICE OIL COMPANY, *Appellant*
vs.
B. P. DUNLAP ET AL, *Appellees*
} *No. 8863*

Appellant's Motion for Leave to File Second Motion for Rehearing

To Said Honorable Court:

Cities Service Oil Company, appellant, with utmost deference, respectfully suggests to the court that in its opinion on rehearing, this Honorable Court overlooked the stipulation of counsel appearing on Record p. 208, concerning the development of the Rogers lease, and also misconstrued the effect of the Texas decisions which (in the opinion of counsel) clothe the purchaser of the legal title, as was W. P. Chandler and appellant in this case, with a presumption of law as to innocence, good faith and payment of consideration (which this court holds to be a rule of property *Turner v. California Co.* (C. C. A. 5 Tex.), 54 F. (2d) 552, 553); and also overlooked the provision of the Chandler lease obligating Chandler to offset wells within 150 feet of the leased premises (R. p. 142), which has been

held by the Texas courts to be sufficient consideration for a lease and to support the defense of innocent purchaser (*Jones v. Bevier*, 59 S. W. (2d) 945, writ denied) even where not specifically written into the lease but only implied (*Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ denied); and also misconstrued or overlooked the effect of the Texas decisions holding that $1.00 paid is a sufficient consideration for an oil and gas lease (*Emde v. Johnson*, 214 S. W. 575, writ denied, and other cases cited in the accompanying motion for rehearing), and also misconstrued as we think the effect of the decision of the Supreme Court of the United States in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487, applied to suits in equity by *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290; and also overlooked evidence in the opinion of counsel sufficient to discharge the burden of proof as to innocent purchaser, even if the rule announced by this court in its opinion on rehearing as to the burden of proof be followed. These being matters appearing for the first time in the opinion on motion for rehearing, counsel for appellant deem it their duty to call the attention of this court thereto for correction, in the first instance, and therefore with utmost deference, present to this Honorable Court their second motion for rehearing, and respectfully pray leave that the same be filed and considered, to the end that justice be done, especially in view of the extreme importance of the rule announced by this court, and

which counsel preparing this motion deem directly contrary to the *Erie* and *Ruhlin* Cases above referred to.

Counsel for appellees are Angus G. Wynne and W. A. Wade, Longview, Texas, to whom copies of this motion, as well as of the motion for rehearing accompanying same, have been forwarded by first class mail, properly addressed and with postage duly paid, at the time this motion and the motion for rehearing accompanying same is being sent to the Clerk.

WHEREFORE, appellant respectfully prays leave to file its second motion for rehearing, and that upon such rehearing, it be granted such relief as may be appropriate. See *Wichita Royalty Company v. City National Bank of Wichita Falls* (CCA 5), 97 F. 249.

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Of Counsel for Appellant.

DAVID B. TRAMMELL, one of counsel preparing the foregoing motion, certifies that such motion is made in good faith; that in his opinion there are good grounds for the same and that it is not interposed for delay.

DAVID B. TRAMMELL

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

CITIES SERVICE OIL COMPANY, *Appellant*

vs.

B. P. DUNLAP ET AL, *Appellees*

No. 8863

Second Motion for Rehearing

Cities Service Oil Company, Appellant, respectfully shows that in the opinion on rehearing herein filed on January 23, 1939, this Court committed errors, to appellant's prejudice, in the following particulars:

I.

This Court erred in its opinion in stating that "while it appears that the strip of land in dispute has never been developed, we have reviewed the record in a vain search for any proof that any land under the lease has been developed or anything otherwise paid for the lease. What we said in the former opinion about development seems founded on nothing in the record, and to have been a mere assumption," for the reason that there was an express stipulation that the land covered by the lease had been developed for oil and gas, such stipula-

tion appearing on page 208 of the Transcript and being in words as follows:

> "It is further stipulated that Empire Gas & Fuel Company and its successor in title, Empire Oil & Refining Company, said latter company having succeeded to all the title of the former company in and to said oil and gas leases, took possession of the land described in the oil and gas lease and the correction oil and gas lease, and drilled for oil thereon and has produced and is now producing oil from said land and has paid the rentals and royalties therein provided. It is further stipulated that none of the parties to this lawsuit have drilled any wells on the strip of land involved in this controversy." (R. pp. 208-9.)

II.

This Court erred in holding that there was no evidence of consideration adduced by Appellant, for the reasons:

(a) The original lease recites a consideration of $10.00 in hand paid, the royalties therein provided "and the agreements of lessee herein contained" (R. p. 139), and further that—"In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within one hundred fifty (150) feet of and draining the leased premises, lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances." (R. p. 142.) This recital and agreement was expressly

held to be sufficient consideration to support an oil and gas lease in the Texas cases of *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied, and *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ denied, and sufficient to support the defense of innocent purchaser. The oil and gas leases in these cases were "unless" leases (that is, the lease terminated by its terms unless drilling was commenced within a certain term, or delay rental paid, there being no obligation to do either), the lease in *Jones v. Bevier* reciting a consideration of $1.00 paid, the royalties therein provided and the agreements of lessee therein contained, and the same provision above copied from the lease from appellees Rogers to Chandler, and the lease in the *Bailey v. Shell Petroleum Corp.* case reciting $1.00 cash and $1400.00 in oil, payable out of one-eighth (there being no obligation to drill, however). The Shell lease did not contain the express obligation to offset wells on adjoining tracts, but the Court held that such obligation would be implied, and therefore sufficient consideration to support the defense of innocent purchaser, saying:

> "On the theory that the lease contract was insufficient to support the defense of innocent purchaser, appellants have presented a most interesting argument, based upon National Oil & Pipe Line Co. v. Teel, 95 Tex. 586, 68 S. W. 979. Because the express consideration was only $1 and an obligation to pay $1,400 in oil, conditioned upon the discovery of oil, appellants contend that the instrument was without consideration, unilateral, and, therefore,

optional in its nature. *In its legal implications this instrument is on all fours with the lease before us in Jones v. Bevier*, 59 S. W. (2d) 945, 948. *On the principles of law there announced this instrument conveyed to the original lessee an interest in the land, that is, as said in Jones v. Bevier, the lease 'operated as a present conveyance of the oil and gas under the premises described in the lease, and vested in appellee a determinable fee in the oil and gas in place.' On this construction it follows that appellees, holding under a regular chain of title from appellants, could assert against them the defense of innocent purchaser.*

"We say in this case, as we said in Jones v. Bevier, that if the instrument required a consideration one was affirmatively expressed on its face, (a) the $1, and (b) the implied obligation to drill offset wells." (p. 985.)

Refusal of the writ in these two cases by the Supreme Court is an approval by the Supreme Court of the Court of Civil Appeals' opinion, under the express provisions of Art. 1728 (3 Vernon's Ann. Civ. Stats. of 1925, pamph. supp., Acts 1927, 40th Leg., p. 214, Ch. 144, Sec. 1), which so far as pertinent reads;

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the

Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction."

(b) The recitation of $10.00 paid in the Chandler lease (R. p. 139) was sufficient evidence of payment of a valuable consideration to support the lease and the defense of innocent purchaser, such being the express holding in the Texas cases of *Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ denied (citing *Kelly v. Jackson*, 6 Pet. 622, 632, 8 L. Ed. 523); *Russell v. Beckert*, 195 S. W. 607; *Luna v. Johnston*, 11 S. W. (2d) 350; *Robertson v. Hefley*, 118 S. W. 1159; *City of San Saba v. Hudson*, 95 S. W. (2d) 1312, as well as by the cases of *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, and *Jones v. Bevier*, 59 S. W. (2d) 945, above cited, in both of which writs of error were denied.

It is also settled in Texas that $1.00 paid is sufficient consideration for an oil and gas lease. This is expressly held in the following cases: *Emde v. Johnson*, 214 S. W. 575; writ denied; *Hitson v. Gilman*, 220 S. W. 140; *McKay v. Tally*, 220 S. W. 167; *McKay v. Lucas*, 220 S. W. 172; *McKay v. Kilcrease*, 220 S. W. 177; *Johnson v. Russell*, 220 S. W. 352, writ denied; *Lone Star Gas Co. v. McCullough*, 220 S. W. 1114; *Leath v. Humble Oil & Refining Co.*, 223 S. W. 1022; *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied; *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ denied. These

cases are founded on the Supreme Court case of *Queve v. Gulf C. & S. F. R. R. Co.*, 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734, 1 Ann. Cas. 545, where the Supreme Court of Texas held that a recital of $1.00 paid was sufficient consideration for the release of damages for personal injuries. Indeed, this is the rule obtaining generally (18 *C. J.* p. 166, Sec. 47) except in Louisiana (*George v. Manhattan Land & Fruit Co.*, (CCA 5), 51 F. (2d) 28), and numerous cases could be cited to support such rule. See, also, *Corsicana Petroleum Co. v. Owens*, 110 Tex. 568, 222 S. W. 154, where a recited consideration of $28.20 was held sufficient to support a lease, which provided that the lease might be surrendered by the payment of $5.00 and all other amounts due at the time of the surrender, the court adverting to the fact that the consideration was satisfactory to the grantors themselves and there could be no reason for the court striking down that part of it.

It is also the rule, supported both by Federal and State authorities, that the written receipt of the consideration is at least prima facie evidence of the payment thereof, and sufficient to require the person attacking the deed or other instrument to prove otherwise; in other words, such acknowledgment is sufficient to discharge the burden of proof in the absence of countervailing testimony. *New York Life Ins. Co. v. Seifris* (CCA Pa.), 46 F. (2d) 391; *Heiskell v. Curtis* (App. D. C.), 259 F. 987; *DeArnaud v. U. S.*, 151 U. S. 483, 38 L. Ed. 244; *Russell v. Beckert*, 195 S. W. 607; *Moss-Tate Inv.*

Co. v. Owens, 22 S. W. (2d) 1096, writ denied; *Luna v. Johnston*, 11 S. W. (2d) 350; *Haze v. Home Friendly Ins. Co.* (Md.), 197 A. 632; *City of San Saba v. Hudson*, 95 S. W. (2d) 1312; *Stowe v. Belfast Savings Bank*, 92 F. 90, aff. 92 F. 100; *Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912b 360 and note. In the last case it was said:

"* * * In the lease before us we find a valuable consideration paid, as it recites the payment of one dollar down. * * * **Look back at hundreds of deeds through hundreds of years and you will find them stating one dollar as a valuable consideration. To say that such a consideration acknowledged under seal is not good would be to overthrow myriads of deeds. The parties have chosen to treat it as a sufficient consideration; they have contracted that it shall be such; and no court, in the absence of fraud, can nullify their contract.**" (Ann. Cas. 1912b, p. 361.)

In *New York Life Ins. Co. v. Seifris* (CCA 3 Pa.), 46 F. (2d) 391, the court said:

"* * * Something more is required when a party takes the stand to contradict what he has previously, and deliberately, said under his own hand or, as here, under its own seal. *A receipt is a written acknowledgment of payment and therefore evidence of payment. Moreover, it is evidence of a high order because it is the creditor's admission against interest that the debtor has paid his debt.*" (p. 392.)

In *Heiskell v. Curtis* (App. D. C.), 259 F. 987, it was said:

> *"The single assignment of error relates to the burden of proof. It is urged by counsel for defendant that the receipted bill is prima facie evidence of payment, and the burden is upon plaintiff to overcome this presumption. It is undoubtedly the law that a receipt is evidence of a high character as to the truth of its recitals, and while it may be explained by parol evidence, the burden of proof rests upon the one attacking it.* Jones on Evidence, Sec. 492." (p. 988.)

In the Texas case of *Luna v. Johnston*, 11 S. W. (2d) 350, the rule is thus stated:

> "The deed which conveyed the property in question to appellee was executed five years after he and his wife were married, and recited a cash payment of $500. **A recitation of payment in a deed is prima facie evidence that the amount named therein was actually paid, and the burden is upon the person attacking same to show a different consideration.** Russell v. Beckert (Tex. Civ. App.), 195 S. W. 607; Robertson v. Hefley, 55 Tex. Civ. App. 368, 118 S. W. 1159; Whitlock v. Barham & Duncan, 172 Ark. 198, 288 S. W. 4." (p. 351.)

In *City of San Saba v. Hudson*, 95 S. W. (2d) 1312, appellee sued in trespass to try title to recover certain property in the town of San Saba and the city sought by cross action to recover damages on

the general warranty of title contained in its deed. The sole question was whether or not there was in fact any consideration for the deed, and the court said:

> *"The recited consideration of $2,000 in the deed is sufficient in law, and the burden was upon appellants, particularly the interveners who were liable on their warranty of title to the city of San Saba, to show that there was in fact no consideration for the deed."* (p. 1313.)

The rule is thus stated in *Corpus Juris* (66 C. J. p. 1129, Sec. 946):

> *"But purchasers from a grantee are entitled to accept as true express recitals of a deed to their grantor as to the consideration."* (66 *C.J.* 1129.)

(c) The evidence was plainly sufficient to show that Chandler was a purchaser without notice of any mistake in the call for the Wiley Davis corner, the lease to him describing the property identically as in the deed from the Rogers heirs to J. F. Rogers in 1899, and containing the further recitation that it was the same land described in the deed from J. W. Rogers, W. H. Rogers and F. E. Rogers to J. F. Rogers February 28, 1899, recorded in Vol. R, p. 59, Deed Records of Gregg County, Texas, except 2 acres out of the northwest corner sold to R. M. Wood. (R. p. 139 for description in Chandler lease; R. pp. 105-106 for description in deed from J. W. Rogers et al., to J. F. Rogers.) As to the

Empire Gas & Fuel Company the evidence shows that Chandler made an assignment by the same description the next day after his lease was dated (R. p. 138 for date of Chandler lease; R. p. 172 for date of Chandler assignment.) It was not until the latter part of April, 1931, that the land was surveyed by the Empire Gas & Fuel Company (R. p. 144), at which time J. E. Rogers, one of the sons of J. F. Rogers, showed the Empire surveyor the corners. At the time of the survey they had the description of the tract as contained in the Chandler lease, but had to go to Longview to get the description of the 2 acre tract in the northwest corner, from the County Records (R. p. 149). This 2 acre tract which adjoined the Wiley Davis corner was located from its bearing trees by John F. Baker, Surveyor, and its northwest corner (adjoining the Wiley Davis N. E. corner) was in the road, which at that time was about sixty feet wide, well graveled and muchly traveled (R. p. 123). This survey was made in 1934 (R. p. 95). In addition it is to be noted that defendants alleged in their cross action that "they leased in good faith to W. P. Chandler the land described in the lease dated October 20, 1930." (R. bottom p. 37.)

The correction lease was not made until May 8, 1931. (R. p. 168.) Empire Gas & Fuel Co. would be protected, regardless of its knowledge or status, unless appellees were entitled to relief against Chandler (*American Mtg. Co. v. O'Hara* (CCA 9), 56 F. 278; *Hopper v. Tancil*, 3 S. W. (2d) 67).

III.

This Court erred in holding on rehearing that the question involved was a mere matter of procedure, the rule established by Texas decisions being on the contrary that the purchaser of the legal title, in a controversy with the holder of the equitable title or claimant of an equitable right, is presumptively an innocent purchaser without notice, such rule being a presumption of law and a rule of property (*Turner v. California Co.* (C. C. A. 5 Tex.), 54 F. (2d) 552, 553) and it being necessary under Texas decisions for the holder of the equitable title or claimant of the equitable right to dispel such presumption by affirmative pleading and proof.

This Court concludes that "we have here not a case where a Texas statute has created the right asserted, or has created a presumption, or is in any manner to be applied as construed in Texas." It is our understanding that federal courts were required to apply applicable state statutes by the Act of September 24, 1789, and that *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487, only applied this binding effect to rules of law established by decisions of the highest courts of a state, which had theretofore been given to statutes. In other words, while bound by Congressional mandate to follow applicable state statutes, Federal Courts previous to the *Erie R. R. Co.* Case in matters of general law not controlled by statutes refused to follow principles of law as settled by state

decisions; but that *Erie R. R. Co. v. Tompkins* in overruling *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865, held that Federal Courts should also follow applicable state decisions in the same way and to the same extent. Such rule was applied to equity cases by *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290, as well.

It is settled, we think, by Texas decisions, that the purchase of the legal title is attended with a presumption of innocence, good faith and value paid, in a controversy between the holder of such title and the claimant of an equitable right or the holder of an equitable title. Thus in *Ritch v. Jarvis*, 64 S. W. (2d) 831, it was said:

> " * * * **Certain defendants held under regular mesne conveyances from S. Jarvis. These defendants are presumptively innocent purchasers. They are the alleged holders of the legal title under regular conveyance from S. Jarvis. Plaintiffs are the alleged owners of the equitable title, in that their cause of action is a suit in equity to set aside the judgment and recover the legal title.** When the holder of the equitable title seeks to recover the legal title from a subsequent purchaser thereof, the burden is on him to plead and prove that such holder of the legal title is not an innocent purchaser. Elliott v. Wallace (Tex. Civ. App.), 42 S. W. (2d) 1058; Crow v. Van Ness (Tex. Civ. App.), 232 S. W. 539; Crawford v. McDonald, 88 Tex. 626, 33 S. W. 325, 328; Teagarden v. R. B. Godley Lbr. Co., 105 Tex. 616, 154 S.

W. 973; Day v. Johnson, 32 Tex. Civ. App. 107, 72 S. W. 426." (pp. 834-5.)

Again in *R. B. Godley Lbr. Co. v. Teagarden*, 135 S. W. 1109 (aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973), it was said:

"* * * **Is is clear that, as against an equity or equitable estate, the holder of the legal title is presumed to be a holder in good faith.** The well-established rule is that one who seeks to establish an equity or equitable interest as against the holder of the legal title has the burden of proving notice of his equity to the holder of the legal title at the time of his purchase. Cameron v. Romele, 53 Tex. 242; Oaks v. West, 64 S. W. 1036; Saunders v. Isbell, 5 Tex. Civ. App. 515, 24 S. W. 307; Halbert v. De Bode, 15 Tex. Civ. App. 630, 40 S. W. 1011; Turner v. Cochran, 63 S. W. 155." (135 S. W. 1114.)

In affirming the case the Supreme Court said the same thing in the following language:

"The right of the plaintiff Teagarden in the land is an equity. The Godley Lumber Company has the legal title. The rule is that under this state of facts the burden was upon plaintiff to show notice to the Godley Lumber Company. Barnes v. Jamison, 24 Texas 362; Baldwin v. Root, 90 Texas 546, 40 S. W. 8; Rogers v. Houston, 94 Texas 403, 60 S. W. 869." (105 Tex. 620.)

The opinion of the Court in *Garrison v. Crowell*,

67 Tex. 626, 4 S. W. 69, by Judge Gaines states the rule contended for in the following language:

> "It does not appear that he knew that the distance of the west line called for in the deed would not reach the Hodges corner and the Davis line; therefore, there was nothing on the face of the conveyance to put him upon inquiry as to any claim on the part of appellant. He found Stephens in possession of the premises in controversy, holding under a duly recorded deed from appellant himself, which, according to well established rules of construction, embraced the land so possessed. He paid his money upon the faith of a conveyance which imputed an absolute title in his vendor, at least against appellant in this case, and we fail to see any reason why he should be excepted from the rule which protects the innocent purchaser for value against the claim of his adversary which was unknown to him at the time of his purchase." (p. 628 of 67 Tex.)

Judge Stayton in *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909, in holding that a wife's title was equitable and that a purchaser from the husband without notice would take free from her rights, said:

> "It can not be denied that the beneficial interest of husband and wife in their community property is equal, and so without regard to the fact that it may have been conveyed in terms to one only; but does it follow from this that both take a legal title as these words are

used with reference to the rules giving protection to bona fide purchasers? Protection is given to a bona fide purchaser on the ground that it would be unjust to deprive him of property which he has purchased from another holding all the evidences of right necessary under the law to show that he is the true owner of the thing purchased; and when a person not having the entire beneficial interest is permitted by those having adverse interests to hold the evidences of perfect right in himself prescribed by law for the purpose, among others, of showing who the true owner is, **then the law imputes to those having such adverse interests some degree of negligence, for which they ought to suffer rather than that loss should be imposed on a bona fide purchaser from one holding the evidences of complete ownership.**" (82 Tex. 590.)

In *Turner v. California Company*, 54 F. (2d) 552, in an appeal from the Western District of Texas, suit was brought by the California Company to quiet its title against parties claiming under the children of a deceased wife of appellee's lessor. This court said that "York [appellee's lessor] had the legal title which would pass upon his conveyance to a bona fide purchaser for value without notice of the equitable interest of his wife during her life or of her children after her death," citing *Patty v. Middleton*, supra, and other cases, and that "*appellee therefore acquired the legal title to its lease freed from any equitable interest unless its knowledge*

that York was a widower at the time he executed the lease constituted notice which upon inquiry would have disclosed that the land was community property." It was concluded that under Texas decisions this was not sufficient to put the California Company on inquiry and the judgment was affirmed, this court saying:

> "* * * **As in our opinion a rule of property has been established in Texas as above indicated, we feel bound to follow it. Harrell v. United Carbon Co. (C. C. A.), 52 F. (2d) 790." (p. 553.)**

Under *Swann v. Mills*, 219 S. W. 850, and *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69, appellant is clearly the holder of the legal title, and defendants the claimants of an equitable right, or at most only an equitable title. As aptly said in *Swann v. Mills*, supra:

> "* * * *Whether Ingraham intended to do so or not, he executed a deed which conveyed to the true west boundary line of the Neil survey, and thereby invested his grantee with the legal title to all he described. Whatever interest remained in him by reason of a mistake in thus describing the land was an equity, of which there was no written record. One purchasing from Ingraham's grantee without notice of that equity would acquire title to all the land described in the deed.*" (219 S. W. 852.)

The facts here also make applicable the case of

Miller v. Southland Ins. Co., 68 S. W. (2d) 558, in that there the court, in following *Garrison v. Crowell*, supra, said "*there was nothing in its physical aspect or in its occupancy which could have put the insurance company upon notice of any claim adverse to M. K. Miller.*" (68 S. W. (2d) 563.) Here the two acre tract out of the northwest corner which was excepted from the property described in the Chandler lease (R. p. 139) was located by John F. Baker, surveyor for appellant, in 1934 (R. p. 95), the tree at the northeast corner called for being found, and the northwest corner, which would have adjoined the Wiley Davis corner, being in the road, Mr. Baker testifying: "*I did not find anything at the northwest corner of the tract, the corner being in the road. When I was there the road was about sixty feet wide and was a well graveled and muchly traveled road at the time.*" (R. p. 123.)

IV.

This Court erred in its opinion on rehearing in that the effect thereof is to grant appellees a reformation in 1938 of an instrument executed October 20, 1930, filed for record November 18, 1930, in a suit filed December 18, 1934, the description having originated in a deed dated February 28, 1899, filed February 10, 1900 (R. p. 105), without (a) an affirmative plea for reformation; (b) without any explanation in the appellees' cross bill why there had been a delay of over thirty years in attempting to have the description reformed; and (c) in direct violation of the four year statute of limitation of the state of Texas (Art. 5529, Vernon's Rev. Civ. Stats. of 1925.)

As stated the call for the Wiley Davis northeast corner originated in the deed from W. H. Rogers et al to J. F. Rogers, dated February 28, 1899, and filed for record February 10, 1900 (R. p. 105). In 1917 by deed recorded May 10, 1917, the wife and children of J. F. Rogers conveyed to J. W. Mings two acres out of the northwest corner of the tract in controversy, such tract witnessed by a postoak at the northeast corner, a black jack at the southwest corner *on the east side of the Union Grove public road and running north with the meanderings of such road to the place of beginning* (R. p. 122), and which corner in 1934 was in the public road then about sixty feet wide and well traveled and graveled. (R. p. 123.) Appellant's bill of com-

plaint was filed December 18, 1934 (R. p. 13), and the answer and cross action filed January 27, 1936 (R. p. 43). Such cross action or cross bill in the alternative prays that all claims of the Empire Gas & Fuel Company to the land described in the lease from Rogers to Dunlap be cancelled; that if the correction lease to the Empire be held valid, that a partition be had and that the interest of all of the heirs of Louisa Rogers, who did not join in such ratification lease, be set aside to Dunlap, etc. (R. pp. 42-43.) No excuse is alleged by appellees why the description of the J. F. Rogers tract calling for the Wiley Davis northeast corner, which had been recorded since 1900, was not sought to be corrected at an earlier date (R. pp. 28-43), and if such answer and cross bill can be construed to be one to reform either the deed to J. F. Rogers, or the lease to W. P. Chandler, it was barred by Article 5529, 16 *Vernon's Rev. Civ. Stats. of* 1925, which reads:

> "Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward." (p. 321.)

Not only was such relief barred by the Texas statutes of limitation, but also by equitable laches, as held both by this court and the Texas Supreme Court (*Connolly v. Hammond*, 51 Tex. 635; *Empire*

Gas & Fuel Co. v. Higgins Oil & Fuel Co. (CCA 5), 279 F. 977).

Of course, record of the deed from W. H. Rogers et al to J. F. Rogers and the lease from J. E. Rogers et al to W. P. Chandler affected the parties grantor therein with notice as to the mistake in description and limitation began to run as of such date. *J. R. Watkins Co. v. Gibbs*, 66 S. W. (2d) 355; *Central National Bank v. Barclay*, 254 S. W. 140; *Vodrie v. Tynan*, 57 S. W. 680; *Martinez v. Gutierrez's Heirs*, 172 S. W. 766, writ denied; *Calhoun v. Burton*, 64 Tex. 510; *Boren v. Boren*, 85 S. W. 48, writ denied; *Ryman v. Petruka*, 166 S. W. 711; *Lant v. Manley*, 71 F. 7; *Teall v. Schroder*, 158 U. S. 172, 39 L. Ed. 938; 20 *L. R. A.* (N. S.) 207, note.

V.

Counsel for appellees are Angus G. Wynne and W. A. Wade, who reside at Longview, Texas, and to whom copies of this motion have been sent by first class mail, properly addressed and with postage paid, at the same time that the motion is forwarded to the Clerk of this Honorable Court.

VI.

WHEREFORE, appellant respectfully prays this Honorable Court to grant it a rehearing, and upon such rehearing to reverse the judgment of the court below, and in lieu thereof enter a judgment quieting its title to the land in controversy, removing the clouds cast upon appellant's title by the claims of appellees and the various instruments evidencing same, and granting appellant such other and further relief as may be appropriate, including general relief.

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DAVID B. TRAMMELL, one of counsel preparing the foregoing motion, certifies that such motion is made in good faith; that in his opinion there are good grounds for the same and that it is not interposed for delay.

DAVID B. TRAMMELL

ORDER WITHDRAWING OPINION OF THE COURT FILED JANUARY 23, 1939, on MOTION FOR REHEARING, FOR CORRECTION.

Extract from the Minutes of February 24, 1939.

CITIES SERVICE OIL COMPANY,

No. 8863 versus

B. P. DUNLAP, ET AL.

ORDERED that the opinion on motion for rehearing filed January 23, 1939, in the above stated case be withdrawn for correction, and as corrected be filed herewith.

CORRECTED OPINION ON MOTION FOR REHEARING - FILED FEBRUARY 24, 1939.

- - - - - - - -

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

No. 8863

CITIES SERVICE OIL COMPANY,

Appellant,

versus

B. P. DUNLAP, ET AL.,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Texas.

ON MOTION FOR REHEARING.

February 24, 1939

Before SIBLEY, HOLMES and McCORD, Circuit Judges.

SIBLEY, Circuit Judge: The motion for rehearing asserts that in the Texas courts the rule is established that on an issue of bona fide purchase for value without notice the burden of proof is upon him who attacks the legal title and asserts the equity, citing *White vs. Hix*, 104 S. W. (2) 136; and the contention is made that under the ruling in *Erie R. R. Co. vs. Tompkins*, ... U. S. ....., the State law should have been applied in this court.

In 66 C. J., Vendor and Purchaser, §1063, we find the Texas rule, supported by a multitude of Texas cases, stated as above, but as being exceptional. The rule elsewhere, also supported by abundant authority, is said to be: "As a general rule the person relying on the defense of a bona fide purchase for value without notice has the burden of proving such defense." The federal courts have held according to this general rule. In *Boone vs. Childs*, 10 Pet. at p. 212, upon an abundance of cited authority, the allegations required to raise the defense are stated in detail, and it is added: "Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchase without notice; the case stated must be made out." In *Smith vs. Auten*, 131 U. S. Appendix lxxv, lxxviii, it was said: "The rule which affords protection to a bonda fide purchaser without notice has no application to this case. To bring the defense within it it must be averred in the plea or answer *and proved* that the conveyance was by deed, that the vendor was seized of the legal title, and that all the purchase money was paid and paid before notice." In *Wright-Blodgett Co. vs. United States*, 236 U. S. 397, 403, after stating that bona fide purchase for value would be a perfect defense, the court continues: "But this is an affirmative defense, which the grantee must establish in order to defeat the Government's right to the cancellation of the conveyance which fraud alone is shown to have induced." *Boone vs. Childs*, and *Smith vs. Auten*, and other authorities are cited for the statement. In this court the question was directly ruled in *Johnson vs. Georgia Loan & Trust Co.*, 141 Fed. 593. A like conclusion was reached in *Nickerson, Trustee, vs. Meacham*, 14 Fed. 881; *Tobey vs. Kilbourne*, 222 Fed. 760; *Meyer vs. Ritter*, 268 Fed. 937; *Mercantile Trust Co. vs. Chicago*, 123 Fed. 393, 395. We have found no federal case to the contrary.

In the present case the appellant is the original

complainant, seeking a decree quieting its title. It has entered a court of equity, asking equity and bound to do equity. The defendants in their answer set up a mistake, correctable in equity, in the partition deed made to complainant's grantor, J. F. Rogers. Complainant replies, denying the alleged mistake and alleging additionally in very general terms that it and its predecessors in title purchased in good faith, paying value for the oil and gas lease it holds in reliance on the deed as written, and without notice or knowledge of the claim now asserted that the call for the Wiley Davis northeast corner was inserted by mistake. There was no further pleading.

The first contention made is that this averment in complainant's reply, not having been denied, stands admitted. It cannot be sustained. The former Equity Rules control, and provide for no answer to a reply, certainly not unless specially required by the court. If the answer contains a counter-claim, there is to be a reply, but new matter set up in the reply is not to be answered but is to be taken as denied. Equity Rule 31. Issue stands joined on the new facts alleged by this complainant's reply concerning its purchase for value without knowledge or notice. It seems to us that the burden of proving these facts ought reasonably to rest on the complainant, both because it has alleged them and they are essential to its success, and because they are peculiarly within its knowledge. The oil and gas lease was made to W. P. Chandler on Oct. 20, 1930, for a recited payment of $10.00 and royalties to be paid and other things promised. The very next day Chandler assigned the lease to complainant for a recited payment of $1.00 and other valuable considerations. Chandler's recited payment of $10.00 is a nominal consideration and not value. The recital, moreover, according to the federal cases above referred to, is no evidence at all of payment as against the defendants. The royalties and other things promised

were in the future, and could not have become due and have been paid by him before his assignment the next day. What the complainant itself paid, and with what knowledge, it of course knows and could easily prove. ~~While it appears that the strip of land in dispute has never been developed, we have reviewed the record in a vain search for any proof that any land under the lease has been developed or anything otherwise paid for the lease. What we said in the former opinion about development seems founded on nothing in the record, and to have been a mere assumption.~~ There is a ~~total~~ failure of evidence, not only as to bona fides and want of notice, but as to what was paid and to whom, and when and how; the details of which the maker of this plea has from the earliest time been held bound to allege and, when put in issue, to prove.

This seems to us a matter of practice or procedure and not a matter of substantive law. There is no question as to what are the rights of a bona fide purchaser, or as to whether the facts established make complainant out such, but only a question of how and by whom the facts shall be shown to the court. Such matters are not within the decision in *Erie R. R. Co. vs. Tompkins*, and the cases following it. At the very time these decisions were made, the Supreme Court was putting forward procedural rules to govern uniformly in the courts of the United States the practice in both law and equity cases, and was extending them even to questions of the admissibility of evidence and the competency of witnesses. Rule Civil Procedure 43. The procedure in equity cases has always been governed by a practice uniform over the United States and independent of that in the State courts. This was held proper in federal courts in Louisiana where as in Texas there are no separate courts of equity. *Livingston vs. Story*, 9 Pet. 631, *Story vs. Livingston*, 13 Pet. 358.

We have here not a case where a Texas statute has

created the right asserted, or has created a presumption, or is in any manner to be applied as construed in Texas. The question is simply what is the proper practice in courts of equity. The practice followed in the State courts of Texas, where equity courts as such do not exist, is not controlling.

REHEARING DENIED.

~~A true copy~~:
~~Teste~~:

.....

~~Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.~~

ORDER DENYING SECOND MOTION FOR REHEARING

Extract from the Minutes of February 24, 1939.

CITIES SERVICE OIL COMPANY,

No. 8863 versus

B. P. DUNLAP, ET AL.

It is ordered by the Court that the Second petition for rehearing filed in this cause be, and the same is hereby, denied.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA
UNITED STATES CIRCUIT COURT OF APPEALS
FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 329 to 397, next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8863, wherein Cities Service Oil Company is appellant, and B. P. Dunlap, et al., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record, numbered 1 to 328 are identical with the printed record upon which said cause was heard and decided in the said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 8th day of March, A. D. 1939.

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

By /s/ E. WENDLING,
Deputy Clerk.

(SEAL)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 1, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 6 1939
CHARLES ELMORE CROPLEY
CLERK

In The

Supreme Court of the United States

October Term 1938

CITIES SERVICE OIL COMPANY,
Petitioner

v.

B. P. DUNLAP, ET AL.

No. [redacted] 28

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Supporting Brief

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In The

Supreme Court of the United States

October Term 1938

CITIES SERVICE OIL COMPANY,
Petitioner

v.

B. P. DUNLAP, ET AL.

No._____

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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To the Honorable, the Supreme Court of the United States:

Cities Service Oil Company, a corporation incorporated under the laws of the State of Delaware, respectfully presents this its petition for certiorari to the Honorable Circuit Court of Appeals of the United States for the Fifth Circuit, to such end respectfully showing:

Preliminary Statement

Empire Gas & Fuel Company, a Delaware Corporation, predecessor in interest of petitioner, the owner of an oil, gas and mineral lease and leasehold estate on a part of the Geo. A. Thomason Survey in Gregg County, Texas (which instrument in Texas vests in

the lessee a defeasible fee to seven-eighths of the oil, gas and minerals (*Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566; *W. T. Waggoner Est. v. Sigler Oil Co.*, 118 Tex. 509, 19 S. W. (2d) 27), brought this suit in equity in the District Court of the United States for the Eastern District of Texas, Tyler Division, against B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie Rogers Waskom and her husband, Azie Waskom, and two others, to quiet its title and to remove cloud from title, jurisdiction of the District Court being based on diversity of citizenship, all of the defendants being citizens of states other than plaintiff, the requisite jurisdictional amount being involved, and the property being situated in such division and district. (R. pp. 20-28.) The defendants were claiming a strip of land off the west side of the tract claimed by plaintiff, and filed answer and cross-action asserting title thereto. (R. pp. 28-43.) Empire Oil & Refining Company, a Delaware corporation, was substituted as plaintiff (R. pp. 50-52), and judgment was after a trial rendered for the defendants (R. pp. 52-53); the court filed findings of fact and conclusions of law (R. pp. 58-72), to which such company excepted (R. pp. 73-81), filed request for additional conclusions (R. pp. 81-91) and appealed (R. pp. 299-328); the appeal by order proceeding in the name of Cities Service Oil Company, Empire Oil & Refining Company having by amendment to its charter changed its name (R. p. 93).

On appeal, the case was affirmed (R. p. 340) on written opinion by the Honorable Circuit Court of Appeals for the Fifth Circuit December 8, 1938 (R. pp. 330-339), and petitioner's motion for rehearing (R. pp. 341-364) was overruled January 23, 1939 (R. p. 365), the court delivering a written opinion on rehearing, which was withdrawn for correction and refiled February 24, 1939 (R. p. 364). A second motion for rehearing was heard and considered but overruled February 24, 1939 (R. p. 397), the court correcting on such second motion for rehearing its former opinion. (R. pp. 392-396.) Petitioner, therefore, presents its petition for writ of certiorari to this Honorable Court.

Brief Statement of the Case

Mrs. Louisa Rogers, the common source of title, was deeded the east half of the G. A. Thomason Survey in 1882 (R. pp. 103-104). This was divided between her four sons J. W. Rogers, W. H. Rogers, F. E. Rogers and J. F. Rogers, February 28, 1899, after her death, by the execution of partition deeds (R. pp. 105-109), W. H. Rogers taking tract No. 1 in the northeast corner (R. pp. 107-108), J. W. Rogers and F. E. Rogers taking approximately the south half (R. pp. 108-109) and J. F. Rogers, through whom petitioner claims, taking tract No. 2 in the northwest corner of the half section under a description reading as follows:

"Being a part of the G. A. Thomas Headright Survey, starting at the N. E. corner of Lot No. 2,

which is the N. W. corner of the W. H. Rogers tract, Lot 1;

"Running West 440 yards **to Wiley Davis N. E. corner**; thence South 880 yards; thence East 224 yards; thence North 310 yards at 12 deg. East of North;

"Thence East 754 yards to W. H. Rogers line;

"Thence North 572 yards to starting point containing 68-1/5 acres, more or less." (R. pp. 105-106.)

A map according to the trial court's findings, colored for easy reference, appears following p. 16 hereof.

Wiley Davis owned the land adjoining Mrs. Rogers' property on the west, his northeast corner being marked by a pine knot and a marked pine witness tree (R. p. bottom 201 and top p. 202), and being coincident with her northwest corner.

October 20, 1930, the widow and children of J. F. Rogers, then deceased, to-wit: Mrs. L. J. Rogers, J. E. Rogers, Elvie Waskom and A. S. Waskom, her husband, leased the property to W. P. Chandler by the same description, except that a two-acre tract out of the northwest corner sold to R. M. Wood was excepted (R. p. 139), the lease reciting $10.00 in hand paid, the royalties provided and also an express provision to offset wells within 150 feet of the line (R. p. 142), which recitation and agreement is in Texas sufficient consideration for such a lease or conveyance (*Jones v. Bevier*, 59 S. W. (2d) 945, writ denied; *Bailey v. Shell Pet. Corp.*, 95 S. W. (2d) 982, writ denied; also authorities cited on pages 10-11 of brief). Chandler assigned to Empire Gas & Fuel Company (R. p. 172)

for a recited consideration of $1.00 and other valuable considerations, the receipt for which was acknowledged (R. pp. 172-174), and later the same lessors executed a correction lease to Empire Gas & Fuel Company, the distances being given in feet but intended to cover the same property (R. pp. 162-168).

It was the contention of petitioner that its property extended all the way from the northwest corner of the W. H. Rogers tract on the east to the Wiley Clark northeast corner on the west (excepting the two-acre tract sold to R. M. Wood out of the northwest corner), whereas the defendants claimed a strip of land 68 feet along the west side of the tract which they said was not partitioned in 1899 but left out for use as a road, and that the call for the Wiley Davis corner was made by mistake (R. pp. 35-36). This was denied by petitioner, who also pleaded that the Wiley Davis northeast corner was a fixed and certain point at the time of the partition and thereafter, and petitioner pleaded innocent purchaser in good faith for a valuable consideration as against the claim of mistake (R. p. 45). It was also contended by petitioner that if the strip was in fact a road as defendants pleaded, J. F. Rogers, and petitioner as his remote vendee, would, under Texas decisions, take title thereto under the familiar rule that conveyances bounded by a road will pass title to the road, or so much thereof as is owned by the grantor, subject, of course, to the easement of roadway. Petitioner was not seeking to develop the road for oil production, although defendants were.

The questions presented in this petition for certiorari were duly raised in the trial court by excep-

tions to the court's findings of fact, request for additional findings, and in the briefs and motions for rehearing in the Circuit Court of Appeals.

Reasons for Allowance of Writ of Certiorari

1. The Honorable Circuit Court of Appeals, in affirming the judgment below, wholly disregarded the applicable Texas cases of *Mitchell v. Bass*, 26 Tex. 372; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448; *Texas Bitulithic Co. v. Warwick* (Tex. Com. App.), 293 S. W. 160, and *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391, and other cases, which hold that where there is a conveyance of land adjacent to or adjoining a roadway, whether public or private, the road will pass to the grantee by virtue of such deed, unless there is in the conveyance language expressly rebutting such construction, or specifically indicating a contrary intent, (there being no such language in the instant deed, R. pp. 105-106), and it is immaterial in this connection that the road was never opened or that it was abandoned. (*Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448; *Amerman v. M. K. T. Ry. Co.*, 182 S. W. 54.) It was expressly pleaded by defendants that the strip of land in controversy was *"left out by the surveyor at the request of the Rogers family for a road to be jointly owned and controlled by the parties to said partition"* (R. pp. 34-35), and F. E. Rogers, one of the defendants, testified that when Simmons, the surveyor, started surveying off Lot No. 2 (the tract held by petitioner under its lease) at the time of the

partition he came back to the north line and ran over 440 yards and said to them that there was a chain left over there, whereupon his brothers remarked that they would keep that just like it was. *"We were using that for a road at that time of year. We had sold the mill but the road was still there"* (R. p. 22), and again that *"since the division between the heirs * * * a road has been open for the use of anyone who wanted to travel it."* (R. pp. 223-4.) The deed from the other Rogers heirs to J. F. Rogers (R. pp. 105-107) would, therefore, under applicable Texas decisions, have covered and included the whole of the roadway, it being wholly owned by the grantors and grantee, there being nothing in the deed to rebut such intent, even if the call for the Wiley Davis corner, which would have included the road in the description, be disregarded. The effect to be given to and construction of a deed being a question of local law (*Massachusetts v. New York*, 271 U. S. 65, 93, 70 L. Ed. 838, 851; *Hardin v. Jordan*, 140 U. S. 371, 35 L. Ed. 428; *Shell Pet. Corp. v. Ward* (C. C. A. 5 Tex.), 100 F. (2d) 778), the Honorable Circuit Court of Appeals has, therefore, decided a question of local law in conflict with applicable decisions of the Texas courts, within the meaning of Subdivision (*b*) of Paragraph 5 of Rule 38 of this Honorable Court.

2. The Honorable Circuit Court of Appeals for the Fifth Circuit in so deciding, as set forth in the preceding paragraph, held directly contrary to the case of *Paine v. Consumers' Forwarding & Storage Co.*, 71 F. 626, by the Sixth Circuit, opinion by Judge Taft, and also the decision in the case of *Roxana*

Petroleum Corp. v. Sutter, 28 F. (2d) 159, by the Eighth Circuit, in each of which cases it was held that the conveyance of a tract of land adjacent to a road or right-of-way passed title to such road, in the absence of a clear intent to the contrary.

3. The Honorable Circuit Court of Appeals, in overruling petitioner's assignments of error directed to the admission over petitioner's objection of the testimony of F. E. Rogers, in substance that the strip of land in controversy was left out of the partition intentionally, and in giving effect, by excluding the land in controversy from such deed and lease, to such testimony, wholly disregarded the Texas cases of *Gulf Production Co. v. Warren*, 99 S. W. (2d) 616, writ refused; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391, and other cases establishing a contrary rule.

4. The Honorable Circuit Court of Appeals in this case, in denying petitioner's plea of innocent purchaser, wholly disregarded applicable Texas decisions on questions of local law in this: the call in the partition deed to J. F. Rogers and in the lease to W. P. Chandler for the Wiley Davis northeast corner vested in J. F. Rogers in the first instance, and in Chandler (through whom petitioner holds by assignment or conveyance) the legal title to the land in controversy (*Swann v. Mills*, 219 S. W. 850, by the Texas Court of Civil Appeals; *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69). The right of the defendants to the strip in controversy was therefore an equity, or at most an equitable title, since the legal title passed by deed to J. F. Rogers and to petitioner from his heirs. In

Texas the ownership of the legal title is attended with a presumption of innocence, good faith and value paid (*Ritch v. Jarvis*, 64 S. W. (2d) 831; *R. B. Godley Lbr. Co. v. Teagarden*, 135 S. W. 1109, aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973; *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69; *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909; *Turner v. California Co.* (C. C. A. 5 Tex.), 54 F. (2d) 552), the burden being upon the holder of the equitable title to plead and prove that the holder of the legal title had notice of the equity, or was a purchaser mala fide or that a valuable consideration was not paid.[1] The Honorable Circuit Court of Appeals for

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[1]Thus in *Ritch v. Jarvis*, 64 S. W. (2d) 831, it was said:

"* * * Certain defendants held under regular mesne conveyances from S. Jarvis. These defendants are presumptively innocent purchasers. They are the alleged holders of the legal title under regular conveyance from S. Jarvis. Plaintiffs are the alleged owners of the equitable title, in that their cause of action is a suit in equity to set aside the judgment and recover the legal title. When the holder of the equitable title seeks to recover the legal title from a subsequent purchaser thereof, the burden is on him to plead and prove that such holder of the legal title is not an innocent purchaser." (pp. 834-5.)

And in *R. B. Godley Lbr. Co. v. Teagarden*, 135 S. W. 1109, (aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973) it was said:

"* * * It is clear that, as against an equity or equitable estate, the holder of the legal title is presumed to be a holder in good faith. The well-established rule is that one who seeks to establish an equity or equitable interest as against the holder of the legal title has the burden of proving notice of his equity to the holder of the legal title at the time of his purchase." (135 S. W. 1114.)

In the Supreme Court the same rule was said in this language:

"The right of the plaintiff Teagarden in the land is an equity. The Godley Lumber Company has the legal title. The rule is that under this state of facts the burden was upon plaintiff to show notice to the Godley Lumber Company." (105 Tex. 620.)

the Fifth Circuit itself has held this to be a rule of property in Texas (*Turner v. California Co.*, 54 F. (2d) 552), saying: " * * * As in our opinion a rule of property has been established in Texas as above indicated, we feel bound to follow it. *Harrell v. United Carbon Co.* (C. C. A.), 52 F. (2d) 790 (54 F. (2d) 553)."

5. The Honorable Circuit Court of Appeals in this case in overruling the motion for rehearing wholly disregarded Texas decisions in this: That although the lease to W. P. Chandler, under which petitioner holds, recites a consideration of $10.00 paid, and contains a binding obligation to offset wells on adjoining property within 150 feet (R. p. 142), the Honorable Circuit Court of Appeals held there was no proof of consideration, such holding being in direct conflict with the Texas cases of *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied, and *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ denied,[2] *Jones v. Bevier* reciting a consideration of $1.00 and containing the express obligation to drill offsets, as did the lease in the case at bar, and the *Bailey v. Shell Petroleum Corporation Case* reciting $1.00 paid, the court holding such recitation, together with the implied obligation to drill offset well, to be sufficient. The court also disregarded the express holding of the Texas cases of *Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ denied (citing *Kelley v. Jackson*, 6 Pet.

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[2]Refusal of the writ in these two cases by the Supreme Court of Texas is an approval by such court of the opinion of the Court of Civil Appeals, under the express provisions of Art. 1728, 3 Vernon's Ann. Civ. Stats. of 1925, Pamph. Supp; Acts 1927, 40th Leg., par. 214, ch. 144, Sec. 1.

622, 632, 8 L. Ed. 523); *Russell v. Beckert*, 195 S. W. 607; *Luna v. Johnston*, 11 S. W. (2d) 350, and *City of San Saba v. Hudson*, 95 S. W. (2d) 1312, that the recitation of a consideration paid was sufficient proof of consideration when not rebutted; and there was no rebutting testimony here. It has for many years been settled in Texas that $1.00 is a sufficient consideration for an oil and gas lease such as that held by petitioner. (*Emde v. Johnson*, 214 S. W. 575, writ denied; *Hitson v. Gilman*, 220 S. W. 140; *McKay v. Tally*, 220 S. W. 167; *McKay v. Lucas*, 220 S. W. 172; *McKay v. Kilcrease*, 220 S. W. 177; *Johnson v. Russell*, 220 S. W. 352, writ denied; *Lone Star Gas Co. v. McCullough*, 220 S. W. 1114; *Leath v. Humble Oil & Refining Company*, 223 S. W. 1022; *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied; *Bailey v. Shell Pet. Corp.*, 95 S. W. (2d) 982, writ denied. These cases are founded on the Supreme Court case of *Quebe v. Gulf C. & S. F. RR. Co.*, 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734, 1 Ann. Cas. 545, where it was held that a recital of $1.00 paid was sufficient consideration for a written release of damages for personal injuries.

6. The Honorable Circuit Court of Appeals, in holding that the recital of $10.00 paid in the lease to Chandler was not evidence of the payment of consideration, also conflicted with the Federal court cases of *New York Life Ins. Co. v. Seifris* (C. C. A. Pa.), 46 F. (2d) 391; *Heiskell v. Curtiss* (App. D. C.), 259 F. 987; *Stowe v. Belfast Savings Bank*, 92 F. 90, aff. (C. C. A.), 92 F. 100, and also disregarded a salutary rule of general effect in the United States

since the earliest times (*Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B 360), and many cases cited in Note, where it was said that the lease was supported by a valuable consideration "as it recites the payment of $1.00 down. * * * Look back at hundreds of deeds through hundreds of years and you will find them stating $1.00 as a valuable consideration. To say that such a consideration acknowledged under seal is not good would be to overthrow myriads of deeds." (Ann. Cas. 1912B, p. 361.)

7. In failing to apply applicable Texas decisions as set forth in the preceding paragraphs, the Honorable Circuit Court of Appeals for the Fifth Circuit wholly disregarded and refused to apply the case of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1187, 114 A. L. R. 1487, and also *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290, the latter case applying the rule adopted in *Erie Railroad Co. v. Tompkins* to equity cases, as was in effect done by *Mason v. United States*, 260 U. S. 545, 67 L. Ed. 396.

8. The Honorable Circuit Court of Appeals in this case decided an important question of general law in a way untenable, within the meaning of Paragraph (5) of Rule 38 of this Honorable Court, in that the effect of the holding of the Honorable Circuit Court of Appeals in this case is to grant defendants a reformation of a deed executed in 1899, and a lease executed in 1930, in a suit to quiet title filed by petitioner December 18, 1934 (R. p. 13), the cross action of defendants being filed January 27, 1936 (R. p. 43),

petitioner showing in this connection that the call in the partition deed to J. F. Rogers, petitioner's predecessor in title, dated February 28, 1899 (R. pp. 105-106), for the Wiley Davis northeast corner would have included the strip of land in controversy; that the lease from the widow and heirs of J. F. Rogers to W. P. Chandler, petitioner's predecessor in title, calling for the same Wiley Davis northeast corner was executed October 20, 1930 (R. pp. 138-143); that while defendants pleaded in their answer that the Wiley Davis corner was called for by mistake in the deed, and that such Wiley Davis corner was not fixed or located or susceptible of definite ascertainment at the time, nevertheless F. E. Rogers, one of the grantors in the deed to J. F. Rogers, testified that "I knew where Wiley Davis lives. I knew where the pine tree stood in his northeast corner. It stood out northeast of the school house. I know where the old road jogs around the pine tree. When they cut the road up there the road came almost to the pine tree, I guess" (R. p. 225), and that when Simmons, the surveyor, started to survey off the J. F. Rogers tract he ran over 440 yards and said there was a chain left (R. p. 222), and the answer and cross action was wholly devoid of any excuse for failure to sue to correct the instrument at an earlier date. (R. pp. 28-43.)

Petitioner further shows that the deed to J. F. Rogers from the other heirs of Mrs. Louisa Rogers, dated February 28, 1899, was filed for record in the office of the County Clerk of Gregg County February 10, 1900 (R. p. 105); that the lease to W. P. Chandler was dated October 20, 1930, filed for record in the

office of the County Clerk of Gregg County November 18, 1930 (R. pp. 138-143); that petitioner's original petition was filed December 18, 1934 (R. p. 13), and the answer and cross action was filed January 27, 1936 (R. p. 43). Under the statutes of limitation of the state of Texas (Art. 5529, 16 Vernon's Rev. Civ. Stats. of 1925) an action to reform a deed must be brought within four years after the cause of action accrued, and the Texas courts hold that parties grantor in a deed are affected with notice of a mistake in the description upon the recordation thereof. (*J. R. Watkins Co. v. Gibbs*, 66 S. W. (2d) 355; *Central National Bank v. Barclay*, 254 S. W. 140; *Vodrie v. Tyman*, 57 S. W. 680; *Martinez v. Gutierrez's Heirs*, 172 S. W. 766, writ denied; *Calhoun v. Burton*, 64 Tex. 510; *Boren v. Boren*, 85 S. W. 48, writ denied; *Ryman v. Petruka*, 166 S. W. 711. See also *Lant v. Manley*, 71 F. 7; *Teall v. Schroder*, 158 U. S. 172, 39 L. Ed. 938.)

In this connection also the doctrine of equitable laches applies in Texas to such situation. (*Connally v. Hammond*, 51 Tex. 635; *Empire Gas & Fuel Co. v. Higgins Oil & Fuel Co.* (C. C. A. 5 Tex.), 279 F. 977.)

Counsel for all respondents except J. B. Parker and Curtis M. Willock are Hon. Angus G. Wynne and Hon. W. A. Wade, who reside at Longview, Gregg County, Texas, and Hon. Cecil N. Cook of Houston, Texas, is attorney for such respondents Parker and Willock; all of whom have been duly served with copies of this petition and the record therein, as evi-

denced by their receipt and waiver of notice attached hereto.

WHEREFORE, for the reasons set forth herein, as well as in the supporting brief, hereto annexed, petitioner respectfully prays this Honorable Court to issue its writ of certiorari to the Honorable Circuit Court of Appeals for the Fifth Circuit, commanding such Honorable Court to forthwith send up a full and complete transcript of the record; that all proceedings be certified to this Court, and that this cause be reviewed and the manifest errors of the Honorable Circuit Court of Appeals be revised and corrected, as provided by law; that upon hearing by this Honorable Court the judgment below be reversed, and petitioner's title to the land in controversy be quieted, the clouds cast upon its title by the claims of the defendants be removed, and that such further proceedings be held herein as may be provided by law and equity.

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Of Counsel.

THE STATE OF TEXAS }
COUNTY OF TARRANT }

DAVID B. TRAMMELL, being duly sworn, says that he is of counsel for CITIES SERVICE OIL COMPANY, a corporation, petitioner, in the foregoing petition for certiorari; that he prepared the foregoing petition for writ of certiorari and that the allegations therein are true and that there is just cause for same as he verily believes.

DAVID B. TRAMMELL.

SUBSCRIBED AND SWORN TO before me this the 27th day of March, A. D. 1939.

MARY RUTLEDGE,
Notary Public in and for
Tarrant County, Texas.

In The

Supreme Court of the United States

October Term 1938

CITIES SERVICE OIL COMPANY
Petitioner

v.

B. P. DUNLAP, ET AL.

No._____

Brief in Support of Petition for Certiorari

May It Please the Court:

Of the numerous propositions urged in the Honorable Circuit Court of Appeals, petitioner deems but the following to come within the provisions of Paragraph 5 of Rule 38 of this Honorable Court, viz:

1. Disregarding for the moment the call for the Wiley Davis northeast corner, it is certain that at all events the land described in the deed from W. H. Rogers et al. to J. F. Rogers, petitioner's predecessor in title, would go to and be bounded by the road, which F. E. Rogers, one of the heirs, testified ran along the strip of land in controversy, and the title of the grantors passed to the grantee under Texas decisions, it being the rule in Texas that title to the roadway under such circumstances passes to the grantee unless expressly reserved in the instrument; and in disregarding such applicable Texas decisions, the Honorable Circuit Court of Appeals departed from the salutary rule established by this Honorable Court in the cases of Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1187,

114 A. L. R. 1487, and Ruhlin v. New York Life Ins Co., 304 U. S. 202, 82 L. Ed. 1290.

2. In so holding, the Honorable Circuit Court of Appeals in this case departed from the rule announced in Paine v Consumer's Forwarding & Storage Co., 71 F. 626, by the Sixth Circuit, opinion by Judge Taft, and the case of Roxana Pet. Corp. v. Sutter, 28 F. (2d) 159 by the Eighth Circuit, each of which cases hold to the same effect as the Texas cases referred to.

3. The Honorable Circuit Court of Appeals in overruling petitioner's assignments of error directed to the admission over petitioner's objection of the testimony of F. E. Rogers, in substance that the strip of land in controversy was left out of the partition intentionally, and in giving effect, by excluding the land in controversy from such deed and lease, to such testimony wholly disregarded the Texas cases of Gulf Production Co. v. Warren, 99 S. W. (2d) 616, writ refused; Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391, and other cases establishing a contrary rule.

4. In denying petitioner's plea of innocent purchaser, the Circuit Court of Appeals disregarded applicable Texas decisions which hold that the purchase of the legal title is attended with a presumption of innocence, good faith and value paid, the burden being on the holder of the equitable title to show the contrary, and the decision being therefore directly contrary to the Erie and Ruhlin Cases above cited. The Fifth Circuit itself held such Texas rule as to the holder of the legal title to be a rule of property in Turner v. California Co., 54 F. (2d) 552.

5. The decision of the Honorable Circuit Court of Appeals also decides an important question of general law in a way untenable in this: That the effect of the decision is to grant reformation of a deed executed in 1899, recorded in 1900, and of a lease executed and recorded more than four years prior to the filing of this suit by petitioner, by eliminating therefrom

the call for the Wiley Davis northeast corner (which would have included the land in controversy), without any excuse for the delay in one instance of over thirty years, and in the other instance of over four years, in asking such relief.

These questions will be discussed in order.

I.

The land described in the deed from W. H. Rogers and the two other sons of Mrs. Louisa Rogers, deceased, to J. F. Rogers, the fourth son, petitioner's predecessor in title, certainly went to and was bounded by a roadway, if the call for the Wiley Davis northeast corner (which would have included the road), be disregarded. Such being true, and there being no language in the deed indicating a contrary intent, under the settled rule in Texas the fee to the road passed to J. F. Rogers, and on to petitioner, subject only to the easement of roadway.

(*a*) There being no language in the deed to the contrary, the grantee took the fee to the roadway, burdened only with the road easement:

Mitchell v. Bass, 26 Tex. 372.
Cantley v. Gulf Production Co., 118 S. W. (2d) 448.
Texas Bitulithic Co. v. Warwick (Tex. Com. App.), 293 S. W. 160.
Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080, cert. den. 288 U. S. 603.
Bolton v. Dyck Oil Co., 114 S. W. (2d) 299.
Weiss v. Goodhue, 102 S. W. 793, writ ref.
Gulf Sulphur Co. v. Wyman, 221 S. W. 310.

Gulf Production Co. v. Warren, 99 S. W. (2d) 616, writ ref.

Guadalupe County v. Poth, 163 S. W. 1050.

Amerman v. M. K. & T. Ry. Co., 182 S. W. 54, writ refused.

(*b*) And it is immaterial so far as the title is concerned, that the road was never opened or that it was abandoned.

Amerman v. M. K. & T. Ry. Co., 182 S. W. 54, writ denied.

Cantley v. Gulf Production Co., 118 S. W. (2d) 448.

(*c*) Under Texas decisions parol evidence to show that it was not the intention to include the roadway is inadmissible.

Gulf Production Co. v. Warren, 99 S. W. (2d) 616, writ ref.

Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080.

(*d*) The same rule has been announced by at least two Circuit Courts of Appeal of the United States.

Paine v. Consumer's Forwarding & Storage Co. (C. C. A. 6 Ohio), 71 F. 626.

Roxana Pet. Corp. v. Sutter (C. C. A. 8 Kan.), 28 F. (2d) 159.

(*e*) The rule is applicable to alleys and private ways.

Weiss v. Goodhue, 102 S. W. 793, writ ref.
Guadalupe County v. Poth, 163 S. W. 1050.
Pecos & N. T. Ry. Co. v. Falls, 96 S. W. (2d) 430.
Paine v. Consumer's Forwarding & Storaging Co. (C. C. A. 6 Ohio), 71 F. 626.

(*f*) Such rule applies to partition deeds as well as other conveyances.

Amerman v. M. K. & T. Rw. Co., 182 S. W. 54, writ ref.
Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080.
Cantley v. Gulf Production Co., 118 S. W. (2d) 448.

(*g*) The presumption obtains that the whole of the land is partitioned unless a portion thereof is expressly excepted.

Gulf Production Co. v. Baton, 108 S. W. (2d) 960, writ ref.
Beck v. Gulf Production Co., 113 S. W. (2d) 258, writ ref.

STATEMENT

Mrs. Louisa Rogers owned in fee simple the east half of the G. A. Thomason Survey in Gregg County, Texas, along the west side of which the strip in controversy is located. She died intestate prior to February 28, 1899, and on that date her four sons divided the land, W. H. Rogers taking tract No. 1 in the

northeast corner; J. W. Rogers and F. E. Rogers the south half, approximately, and J. F. Rogers the tract out of the northwest corner heretofore described in the petition for certiorari, which began at the northwest corner of the W. H. Rogers tract No. 1 and then ran west to the Wiley Davis northeast corner, Wiley Davis owning the land immediately adjoining Mrs. Rogers' land on the west at that place. (Court's Findings, paragraphs 3 to 6, R. pp. 60-62.) The attached exhibit, compiled from the court's findings (pp. 16-17), shows the various tracts, being colored for purpose of more clearly showing the situation of the various tracts.

Wiley Davis' northeast corner was marked by a pine knot and a marked pine tree (R. p. 201). F. E. ROGERS, one of the grantors in the deed to J. F. Rogers, who went with the surveyor Simmons when the land was subdivided (R. p. 220) testified that "I knew where Wiley Davis lived. **I knew where the pine tree stood in his northeast corner.** It stood out northeast of the school house. I know where the old road jogged around the pine tree. When they cut the road up there the road came almost to the pine tree I guess." (R. p. 225.) Over objection of petitioner, F. E. Rogers further testified that when Simmons started surveying off Block No. 2, the J. F. Rogers tract, he came back to the north line and ran over 440 yards for the 80 acre marker, and said " 'Boys, you have got a chain left over there' " and my two older brothers said we will just keep that like it is. **We had been using that for a road at that time of year. We had sold the mill but the road was still there. That is at**

the northwest corner. (R. p. 222.) **"Since the division between the heirs and the establishment of the 440 yd. corner at the north and the establishment at the corner where the gearwheel is located, a road has been open for the use of anyone who wanted to travel it."** (R. pp. 223-224.)

J. E. SPORT, a witness for defendants, who owned the tract of land adjoining the Wiley Davis land on the north (R. p. 37) knew of the pine tree at the Wiley Davis northeast corner and the road running along the west line of the Rogers tract (R. pp. 238-239).

Under such circumstances, the settled rule in Texas is that the conveyance to J. F. Rogers passed title to the road.

The rule was thus stated by our Supreme Court in the case of *Mitchell v. Bass*, 26 Tex. 372, decided in 1862, the court saying:

> **"The established doctrine of the common law is, that a conveyance of land bounded on a public highway, carries with it the fee to the centre of the road, as part and parcel of the grant. Such is the legal construction of the grant, unless the inference that it was so intended, is rebutted by the express terms of the grant.** The owners of the land on each side, go to the centre of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. Upon the discontinuance of the highway, the soil and freehold revert to the owner of the land." (p. 380.)

In *Texas Bitulithic Co. v. Warwick*, 293 S. W. 160,

by the Commission of Appeals, the court construed a deed running to a stake in the west line of the street and thence north 23-3/4 east with the west line of the street to another stake in the line of the street to vest title in the grantee to the center of the street, the court quoting approvingly the language of *Mitchell v. Bass*, supra, and saying:

"The language just quoted has been frequently followed by our Courts of Civil Appeals. See Lewis v. Roach-Manigan Paving Co., 184 S. W. 680; Waples-Painter Co. v. Ross, 141 S. W. 1027; Bond v. Texas & Pacific Railway Co., 15 Tex. Civ. App. 281, 39 S. W. 978; Emerson v. Bedford, 21 Tex. Civ. App. 262, 51 S. W. 889; Cannon v. Healy Construction Co., 242 S. W. 526; Wiess v. Goodhue, 46 Tex. Civ. App. 142, 102 S. W. 797.

"The Court of Civil Appeals, in the instant case, makes an effort to distinguish this case from other Texas cases, on the ground that the lien herein describes the lot by metes and bounds, and runs along and with Monroe street. In other words, the contention is that, since the lien does not expressly call to the center of the street, it must be assumed that the lien was not to extend to property beyond the line of Monroe street. But, a careful review of the Texas cases will show counsel for plaintiff in error to be correct in their statement as follows:

" 'As seen by these cases, the Texas courts hold the fee passes under various assortments of descriptions—some by lot and block number of a dedicated plat and subdivision; some by lot numbers on an undedicated street according to a mere

plat in the deed, by a description calling for a country road in unplatted and undedicated section, and by a description by metes and bounds, which did not include within its limits the highway in controversy.'

"It seems that the Court of Civil Appeals in the case at bar, would have reached a different conclusion had this lot been referred to by lot and block number and not described by metes and bounds which merely called for the line of Monroe street. Counsel for defendants in error, in oral argument, said this was the true test. We submit that this view is erroneous. As already shown, we think the Courts of Civil Appeals in Texas have held differently. In 9 C. J. p. 201, we find the contrary doctrine stated as follows:

" '*The presumption of an intent to convey title to the center of a street or highway is not overcome by the fact the land is described by metes and bounds, and that the distances stated in the description of the deed do not extend to the center of the street.*'

"We think the weight of the better reasoned authorities in other jurisdictions is contrary to the decision of the Court of Civil Appeals herein. **We are of the view that the correct rule was referred to by Chief Justice Wheeler in the Bass Case, supra, when he said that title extends to the center of the street unless the express terms of the grant show a contrary intention.** A very thoroughly considered case upon this point is that of Bowers v. Railway Co. by the Supreme Court of Kansas reported in 119 Kan. 202, 237 P. 913, 42 A. L. R. 229. In that case, the court said:

" 'This court has approved the doctrine that to

exclude half of the highway from a conveyance the grantor must make his purpose to exclude clear by express declaration, or equivalent of express declaration, in the instrument.'" (pp. 162-3.)

In *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448, by the Court of Civil Appeals for the Sixth District of Texas, the deed described the land as "beginning 30 feet west of the northwest corner of Lot No. 2, a stake in Rabbit Creek; thence south 25 east keeping 30 feet from Lot No. 2 for a road reservation 750 varas to the northeast corner of Lot No. 4," the heirs of John Douglas, the grantor, sued to recover title to this 30 ft. strip, but recovery was denied, the court holding, following *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391; *Amerman v. M. K. & T. RR. Co.*, 182 S. W. 54; *Paine v. Consumer's Forwarding & Storage Co.* (C. C. A. 6 Ohio), 71 F. 626, and other authorities, that title to the entire road passed to the grantee, saying:

"Douglass acquired a ten-year limitation title to the whole 30-foot strip, and title to the West half of the strip by virtue of the conveyance to him of Lot No. 5. When he and his children conveyed this lot off, this 30-foot strip was situated upon the eastern edge of his land then conveyed by him. He owned no land on further to the East of the strip.

"So, construing said deed in the light of the presumption herein discussed, **and the conveyance containing no words of specific description to show a contrary intent,** the judgment of the

trial court denying appellants a recovery of the 30-foot strip is affirmed." (p. 451.)

In the course of its opinion the court further said:

" * * * *And it is also immaterial, so far as the title is concerned, that the road was never opened or that it was abandoned.* Amerman v. Missouri, K. & T. R. Co., Tex. Civ. App., 182 S. W. 54." (p. 450.)

Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 351, called for construction of a partition deed. There a tract of fifty-two acres out of the John Douthit Survey in Jefferson County, Texas, had been subdivided, the plat of the subdivision attached to the partition deeds showing the various tracts to abut on a railroad right-of-way and not to include the same. It was there contended that because the partition deeds called for the lot as described on the plat, and the plat did not show such lots to include the railroad right-of-way, that the right-of-way did not pass by the deed. This was denied, the court saying:

"Plaintiffs in error vigorously assert that the plat must be considered as a part of the deed, as it furnishes the only description by which the partition was effected; that when the plat is examined it is found that the distances shown thereon are such as to stop the lines of the lots fronting on the railroad at the exterior line of the right of way. It is further asserted that the specific acreage marked on each lot can only be arrived at by a computation of the area exclud-

ing the right of way. In the light of these facts, it is argued that for the court to extend the distance of the lines running to the right of way beyond their indication on the plat would be to make a different division of this land than that which the parties have made for themselves.

"The law books are replete with instances where the courts have disregarded specific and particular calls in a deed, and so construed the same as to pass the title to land not included in the boundaries of such field notes when such construction was necessary to effectuate the clear intention of the grantor as manifested by language used in other portions of the deed. This is well illustrated in a case where a beginning call of a description of land in a deed runs in exactly the opposite direction from which it was intended by the grantor, resulting in no part of the land intended to be conveyed being covered by the metes and bounds description in the deed. Under such circumstances, where the grantor has in other portions of the deed clearly indicated the particular tract of land intended to be conveyed, the court effectuates such intention by giving the beginning call in the deed an opposite course. The result of this interpretation is to construe the deed to pass title to land, none of which is situated within the boundaries of definite and specific field notes. In such instance the plainly expressed intention of the grantor is not permitted to be defeated, but is made effective." (50 S. W. (2d) 1087-8.)

Previously in its opinion the court had said:

"At the outset it may be said, if defendants in error are correct in their proposition of law, that

the same legal presumption which applies to the conveyance of land abutting on a public highway, street, or stream, is applicable to a railroad right of way, then it necessarily follows that the partition deed between Hebert and the Chaison heirs as well as the deed from Hebert to Weed must be construed to pass the title to the center of the railroad right of way, as neither of said deeds contained any express reservation of the land included in the railroad right of way. **The fact that it appears from the plat that the lines of the lots fronting on the railroad stop at the exterior line of such right of way is not of itself sufficient to exclude the conveyance of the title to the center of the railroad.** It was expressly so determined in the case of Texas Bitulithic Co. v. Warwick, 293 S. W. 160, 162, in which the Commission of Appeals quoted with approval the doctrine announced in Corpus Juris (9 C. J. p. 201), as follows: **'The presumption of an intent to convey title to the center of a street or highway is not overcome by the fact that the land is described by metes and bounds, and that the distances stated in the description of the deed do not extend to the center of the street.'** " (50 S. W. (2d) 1084.)

It is also the rule that parol evidence is not admissible to show that the parties intended to reserve or except the fee to the roadway. This is expressly held in *Gulf Production Co. v. Warren*, 99 S. W. (2d) 616, writ refused, where it was said that:

" * * * The language of the lease was not ambiguous; its legal significance was perfectly clear; **therefore, parol evidence to the effect that 'Mr. Cartwright, prior to the execution of the lease in**

question, went upon the ground and specifically pointed out the tract to be covered by the lease, which designation did not include the railroad right-of-way tract,' was not admissible, but if received, was without probative force in the construction of the lease. 18 C. J. 252. This rule was given controlling effect by the Commission of Appeals in the Rio Bravo Case." (p. 626.)

The Texas cases are in accord with the case of *Paine v. Consumer's Forwarding & Storage Co.*, 71 F. 626, by the Sixth Circuit, Judge Taft delivering the opinion; *Roxana Petroleum Corp. v. Sutter*, 28 F. (2d) 159, and *Roxana Petroleum Corp. v. Corn*, 28 F. (2d) 168. In the *Paine* case there was a conveyance of a lot by number as shown on the plat, the plat describing such lots by dimensions which did not include any part of Water Street. Such conveyance was made after the vacation of the plat, but Judge Taft held that nevertheless the conveyance included Water Street to the center line thereof, saying:

"* * * *It is well settled that where a grantor bounds the lot conveyed on a described street, and is the owner of the land embraced therein, he is estopped to deny the right of the grantee to use the land for street purposes whether it be in fact a street or not.* Thomas v. Poole, 7 Gray, 83; Rodgers v. Parker, 9 Gray, 445; Stetson v. Dow, 16 Gray, 373; Emerson v. Wiley, 10 Pick. 310; Cox v. James, 45 N. Y. 562; Dawson v. Railroad Co., 15 Minn. 136 (Gil. 102); 3 Washb. Real Prop. (5th Ed.), *467, *635, *671; Devl. Deeds, Sec. 1027. *And the same effect is given to a deed describing the lot conveyed by number*

and reference to an undedicated plat upon which the lot is shown to front upon a street. In such a case the easement which the grantee acquires is not limited to that part of the described street in front of his lot, but it extends to the whole street shown so far as it was owned by the grantor when the deed was executed. Rodgers v. Parker, 9 Gray, 445; Thomas v. Poole, 7 Gray, 83; Cox v. James, 45 N. Y. 562. *It is quite true that it has been held that such a deed does not bind the grantor to open and maintain a street in a condition fit for travel* (Hennessee v. Railway Co., 101 Mass. 540); *nor does it imply a covenant that the street is in such a condition when the deed is made. The only effect is that, as between the grantor and grantee, the latter may do nothing inconsistent with this right. Between them, therefore, it is a street. Nor does it prevent this result that the plat was marked vacated, or that in some of the deeds it was referred to as vacated. The vacation of the plat affected only the public easement. It did not conflict with the use of the street as a common way by all the abutting lot owners.*" (pp. 628-9.)

In *Roxana Petroleum Corp. v. Sutter*, 28 F. (2d) 159, by the Eighth Circuit, the lots in question had been subdivided by a plat with an alley running back of the lots, but long prior to the conveyance to Adolph Blank such plat had been vacated. Blank subsequently conveyed the east half of lots 87 and 88 and it was contended on the one hand that such conveyance did not vest title in half of the alley, but only the lots themselves, and on the other that the conveyance carred title to one-half of the alley, although the plat

had long theretofore been vacated. The court concluded that Blank's deed conveyed one-half of the alley, saying:

> "In stating the rule for construing the description in such deeds, the Kansas court further said:
>
> " 'Defendant says Baldwin's deed disclosed no intention to convey half of the highway. This is not the interpretative test. **The test is whether the deed expressed intention to exclude half the highway from the grant.**'
>
> "See, also, Tousley v. Galena Mining & Smelting Co., 24 Kan. 328; Challiss v. Depot & R. Co., 45 Kan. 398, 25 P. 894; A., T. & S. F. Ry. Co. v. Patch, 28 Kan. 470; Paine v. Consumers' F. & S. Co. (C. C. A. 6), 71 F. 626." (28 F. (2d) 162.)

This case was followed by the same circuit in *Roxana Petroleum Corp. v. Corn*, 28 F. (2d) 168, where the lessor leased for oil and gas land described as "Out-lot 9, west division of Oxford, except that part of out-lot 9, west division, theretofore deeded to Wichita Midland Valley Railroad Company for right of way," and the court held that such exception was not sufficient to reserve in the lessor the oil and gas in and under the right of way land, but that it passed to the lessee under the rule herein urged, the court saying:

> "We held in Roxana Petroleum Corporation v. Sutter et al. (No. 8090; opinion filed July 30, 1928), 28 F. (2d) 159, that when the owner conveys a tract of land abutting on a railroad right

of way tract in which such grantor owns the servient estate and the railroad the dominant estate for right of way purposes, his conveyance passes to his grantee such servient estate, unless the intention not to do so be clearly indicated, and we further held that, under the Kansas authorities, the rule applied to an oil and gas lease. See Bowers v. Atchison, T. & S. F. Ry. Co., 119 Kan. 202, 237 P. 913, 42 A. L. R. 228; Cushenbery v. Waite-Phillips Co., 119 Kan. 478, 240 P. 400.

"*Did the exception in the oil and gas lease clearly indicate an intention to except therefrom the oil and gas in the tract of land in and across which Buffington had theretofore conveyed a right of way to the railroad company?*" (p. 170.)

The court then proceeded to hold that such exception was insufficient to reserve in the lessor the oil and gas in and under such right of way.

It seems plain therefore that the Honorable Court of Civil Appeals has held contrary, not only to Texas decisions, but also to decisions of other Circuit Courts of Appeals.

II.

Since the conveyance to J. F. Rogers, calling for the Wiley Davis northeast corner, which included the strip of land in question, passed to J. F. Rogers the legal title thereto, and such legal title by mesne conveyances vested in petitioner, petitioner was under applicable Texas decisions presumptively an innocent purchaser for value and good faith, and the burden

rested on defendants to plead and prove the contrary. This being a rule of property, the Federal Court was bound thereby.

(*a*) The conveyance from W. H. Rogers et al., to J. F. Rogers and the oil and gas lease to Chandler passed the legal title to the land in controversy.

Swann v. Mills, 219 S. W. 850.
Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69.

(*b*) In Texas the purchase of the legal title is attended with a presumption of innocence, good faith and value paid, and the burden rests upon the holder of an equity or equitable title to show the contrary.

Ritch v. Jarvis, 64 S. W. (2d) 831.
R. B. Godley Lbr. Co. v. Teagarden, 135 S. W. 1109, aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973.
Patty v. Middleton, 82 Tex. 586, 17 S. W. 909.
Turner v. California Co. (C. C. A. 5 Tex.), 54 F. (2d) 552.

(*c*) Such rule is a rule of property.

Turner v. California Co. (C. C. A. 5 Tex.), 54 F. (2d) 552.
Harrell v. United Carbon Co. (C. C. A. 5 La.), 52 F. (2d) 790.

(*d*) Such decisions should have been applied by the courts below rather than the Federal rule.

Erie RR. Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1187, 114 A. L. R. 1487.

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290.

Mason v. U. S., 260 U. S. 545, 67 L. Ed. 396.

As heretofore shown, the deed to J. F. Rogers by the other Rogers heirs in 1899 called to begin at the northwest corner of the W. H. Rogers tract No. 1 and ran west 440 yds. to the Wiley Davis northeast corner; thence south 880 yards, east 224 yards, north 10 deg. east 310 yds., east 154 yds. to the W. H. Rogers line; thence north to the beginning. This deed vested in J. F. Rogers the legal title to the land in question. (*Swann v. Mills*, 219 S. W. 850; *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69.) Under settled Texas decisions the purchase of the legal title is attended with a presumption of innocence, good faith and value paid, and the burden rests upon the holder of an equity, such as defendants in the case at bar, to prove to the contrary.

In *Swann v. Mills*, 219 S. W. 850, the court said:

"* * * It will be observed that in both deeds—that from Ingraham to Bellamy and from Bellamy to Mills—the west boundary line of the Neil survey is called for, and is the first call mentioned, as the west boundary line of the land conveyed. Neither of those deeds calls for any objects, natural or artificial, which conflict with the true Neil line as originally established. * * * Whether Ingraham intended to do so or not, he

executed a deed which conveyed to the true west boundary line of the Neil survey, and thereby invested his grantee with the legal title to all he described. Whatever interest remained in him by reason of a mistake in thus describing the land was an equity, of which there was no written record. One purchasing from Ingraham's grantee without notice of that equity would acquire title to all the land described in the deed." (p. 852.)

Petitioner holding the title of J. F. Rogers, was therefore entitled to recover unless it and its vendor W. P. Chandler were shown to be purchasers *mala fide*, or that both had notice, or that they failed to pay value. The Texas cases are certain and definite on this point.

Thus in *Ritch v. Jarvis*, 64 S. W. (2d) 831, it was said:

"* * * Certain defendants held under regular mesne conveyances from S. Jarvis. **These defendants are presumptively innocent purchasers. They are the alleged holders of the legal title under regular conveyance from S. Jarvis.** Plaintiffs are the alleged owners of the equitable title, in that their cause of action is a suit in equity to set aside the judgment and recover the legal title. When the holder of the equitable title seeks to recover the legal title from a subsequent purchaser thereof, the burden is on him to plead and prove that such holder of the legal title is not an innocent purchaser." (pp. 834-5.)

And in *R. B. Godley Lbr. Co. v. Teagarden*, 135 S. W. 1109 (aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973), it was said:

"* * * **It is clear that, as against an equity or equitable estate, the holder of the legal title is presumed to be a holder in good faith.** The well-established rule is that one who seeks to establish an equity or equitable interest as against the holder of the legal title has the burden of proving notice of his equity to the holder of the legal title at the time of his purchase." (135 S. W. 1114.)

In the Supreme Court the same rule was said in this language:

"The right of the plaintiff Teagarden in the land is an equity. The Godley Lumber Company has the legal title. The rule is that under this state of facts the burden was upon plaintiff to show notice to the Godley Lumber Company." (105 Tex. 620.)

In the very late case of *White v. Hix*, 104 S. W. (2d) 136, it was said:

"*It is thoroughly settled that one who claims a superior equitable title to land as against one who has purchased from the holder of the legal title must show that such purchaser did not purchase for value or purchased with notice of the outstanding equity.* Teagarden v. R. B. Godley Lumber Co., 105 Tex. 616, 154 S. W. 973; Commonwealth B. & L. Assn. v. Howard (Tex. Civ. App.), 61 S. W. (2d) 546; Moore v. Humble Oil & Ref. Co. (Tex. Civ. App.), 85 S. W. (2d) 943, 944; Tarkenton v. Marshall (Tex. Civ. App.), 91 S. W. (2d) 473. The same rule applies in favor of lien holders. Texas Loan Agency v. Tay-

lor, 88 Tex. 47, 29 S. W. 1057; McAlpine v. Burnett, 23 Tex. 649, 650." (pp. 139-40.)

The early case of *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69, is therefore directly in point. There appellant and one John H. Stephens were claiming adversely a tract of land in Montague County, Texas. They compromised their claims, in pursuance of which appellant conveyed to Stephens a portion of the tract. Stephens subsequently sold the land to the defendant Crowell. Appellant sued Crowell claiming that they were mistaken in supposing that the southwest corner of the land was in the line of the Davis Survey for which his deed to Stephens called, and that the call of south 889 varas to the southeast corner of the Hodges Survey on the north boundary line of the Davis survey did not reach the Davis survey by some 79 varas, and that the 79 varas were not covered and included by the deed. This is similar to the case at bar, the call west 440 yards not reaching the Wiley Davis northeast corner by approximately 66 feet. There, as here, the strip between the called distance and the adjoinder called for was the land in controversy. Our Supreme Court held that such mistake would not avail appellant as against Crowell, an innocent purchaser.

III.

The Honorable Circuit Court of Appeals, in holding that there was no showing of consideration for petitioner's lease, is in direct conflict with and disregards the cases of Jones v. Bevier, 59 S. W. (2d) 945, writ denied, and Bailey v. Shell Petroleum Corp., 95 S. W.

(2d) 982, writ denied, as well as various other Texas cases.

(*a*) The recitation of $1.00 paid and the obligation to drill offset wells was under Texas decisions a sufficient showing of consideration.

Jones v. Bevier, 59 S. W. (2d) 945, writ den.
Bailey v. Shell Petroleum Corp., 95 S. W. (2d) 982, writ den.

(*b*) The recitation of $10.00 paid in the W. P. Chandler lease was itself sufficient.

Moss-Tate Inv. Co. v. Owens, 22 S. W. (2d) 1096, writ den.
Russell v. Beckert, 195 S. W. 607.
Luna v. Johnston, 11 S. W. (2d) 1159.
City of San Saba v. Hudson, 95 S. W. (2d) 1312.
Kelley v. Jackson, 6 Pet. 622, 632, 8 L. Ed. 523 (cited in Moss-Tate Inv. Co. v. Owens, supra).

(*c*) The recital of $1.00 paid is in Texas sufficient consideration to support an oil and gas lease.

Emde v. Johnson, 214 S. W. 575, writ den.
Hitson v. Gilman, 220 S. W. 140.
McKay v. Tally, 220 S. W. 167.
McKay v. Lucas, 220 S. W. 172.
McKay v. Kilcrease, 220 S. W. 177.
Johnson v. Russell, 220 S. W. 352, writ den.
Lone Star Gas Co. v. McCullough, 220 S. W. 1114.

Leath v. Humble Oil & Refining Co., 223 S. W. 1022.

Jones v. Bevier, 59 S. W. (2d) 945, writ den.

Bailey v. Shell Pet. Corp., 95 S. W. (2d) 982, writ den.

Quebe v. Gulf C. & S. F. RR. Co., 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734, 1 Ann. Cas. 545.

(*d*) The Federal Courts also hold the receipt of money in an instrument prima facie evidence of payment of consideration.

New York Life Ins. Co. v. Seifris (C. C. A. Pa.), 46 F. (2d) 391.

Heiskell v. Curtiss (App. D. C.), 259 F. 987.

Stowe v. Belfast Savings Bank, 92 F. 90, aff. (C. C. A.), 92 F. 100.

(*e*) And this seems to be the better rule and supported by the weight of authority.

Lovett v. Eastern Oil Co., 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B 360, and Note.

The lease in question recites a consideration of $10.00 paid, the royalties provided therein, and also contains an unequivocal agreement to offset a well or wells producing oil or gas in paying quantities within 150 feet of and draining the leased premises. (R. p. 142.) The same provisions were held sufficient in *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied, and *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ denied, to support the defense of innocent pur-

chaser, though in the *Bailey* Case there was no written obligation to offset, but only an implied obligation. On this point in *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ denied, the court said:

"On the theory that the lease contract was insufficient to support the defense of innocent purchaser, appellants have presented a most interesting argument, based upon National Oil & Pipe Line Co. v. Teel, 95 Tex. 586, 68 S. W. 979. Because the express consideration was only $1 and an obligation to pay $1,400 in oil, conditioned upon the discovery of oil, appellants contend that the instrument was without consideration, unilateral, and, therefore, optional in its nature. In its legal implications this instrument is on all fours with the lease before us in Jones v. Bevier, 59 S. W. (2d) 945, 948. On the principles of law there announced this instrument conveyed to the original lessee an interest in the land, that is, as said in Jones v. Bevier, the lease 'operated as a present conveyance of the oil and gas under the premises described in the lease, and vested in appellee a determinable fee in the oil and gas in place.' On this construction it follows that appellees, holding under a regular chain of title from appellants, could assert against them the defense of innocent purchaser.

"We say in this case, as we said in Jones v. Bevier, that if the instrument required a consideration one was affirmatively expressed on its face, (a) the $1, *and (b) the implied obligation to drill offset wells."* (p. 985.)

Refusal of a writ of error in these two cases is, under the express provisions of Article 1728 (3 Ver-

non's Ann. Civ. Stats. of 1925, Pamph. Supp: Act of 1927, 40th Leg. p. 214, ch. 144, Sec. 1), an express approval of the opinion, the decision reading:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction."

The recitation of $10.00 paid in the Chandler lease (R. p. 139) was sufficient evidence of payment of a valuable consideration to support the lease and the defense of innocent purchaser, such being the express holding in the Texas cases of *Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ denied (citing *Kelly v. Jackson*, 6 Pet. 622, 632, 8 L. Ed. 523); *Russell v. Beckert*, 195 S. W. 607; *Luna v. Johnston*, 11 S. W. (2d) 350; *Robertson v. Hefley*, 118 S. W. 1159; *City of San Saba v. Hudson*, 95 S. W. (2d) 1312, as well as by the cases of *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, and *Jones v. Bevier*, 59 S. W. (2d) 945, above cited, in both of which writs of error were denied.

It is also settled in Texas that $1.00 paid is sufficient consideration for an oil and gas lease. This is held in the following cases *Emde v. Johnson*, 214 S. W. 575, writ denied; *Hitson v. Gilman*, 220 S. W.

140; *McKay v. Tally*, 220 S. W. 167; *McKay v. Lucas*, 220 S. W. 172; *McKay v. Kilcrease*, 220 S. W. 177; *Johnson v. Russell*, 220 S. W. 352, writ denied; *Lone Star Gas Co. v. McCullough*, 220 S. W. 1114; *Leath v. Humble Oil & Refining Co.*, 223 S. W. 1022; *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied; *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ denied. These cases are founded on the Supreme Court case of *Quebe v. Gulf, C. & S. F. RR. Co.*, 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734, 1 Ann. Cas. 545, where the Supreme Court of Texas held that a recital of $1.00 paid was sufficient consideration for the release of damages for personal injuries. Indeed, this is the rule obtaining generally (18 *C. J.* p. 166, Sec. 47) except in Louisiana (*George v. Manhattan Land & Fruit Co.* (C. C. A. 5), 51 F. (2d) 28), and numerous cases could be cited to support such rule. See, also, *Corsicana Petroleum Co. v. Owens*, 110 Tex. 568, 222 S. W. 154, where a recited consideration of $28.20 was held sufficient to support a lease, which provided that the lease might be surrendered by the payment of $5.00 and all other amounts due at the time of the surrender, the court adverting to the fact that the consideration was satisfactory to the grantors themselves and there could be no reason for the court striking down that part of it.

It is also the rule, supported both by Federal and State authorities, that the written receipt of the consideration is at least prima facie evidence of the payment thereof, and sufficient to require the person attacking the deed or other instrument to prove otherwise; in other words, such acknowledgment is suf-

ficient to discharge the burden of proof in the absence of countervailing testimony. *New York Life Ins. Co. v. Seifris* (C. C. A. Pa.), 46 F. (2d) 391; *Heiskell v. Curtis* (App. D. C.), 259 F. 987; *DeArnaud v. U. S.*, 151 U. S. 483, 38 L. Ed. 244; *Russell v. Beckert*, 195 S. W. 607; *Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ denied; *Luna v. Johnston*, 11 S. W. (2d) 350; *Haze v. Home Friendly Ins. Co.* (Md.), 197 A. 632; *City of San Saba v. Hudson*, 95 S. W. (2d) 1312; *Stowe v. Belfast Savings Bank*, 92 F. 90, aff. 92 F. 100; *Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B 360 and Note. In the last case it was said:

"* * * *In the lease before us we find a valuable consideration paid, as it recites the payment of one dollar down.* * * *Look back at hundreds of deeds through hundreds of years and you will find them stating one dollar as a valuable consideration. To say that such a consideration acknowledged under seal is not good would be to overthrow myriads of deeds. The parties have chosen to treat it as a sufficient consideration; they have contracted that it shall be such; and no court, in the absence of fraud, can nullify their contract.*" (Ann. Cas. 1912B, p. 361.)

In *New York Life Ins. Co. v. Seifris* (C. C. A. 3 Pa.), 46 F. (2d) 391, the court said:

"* * * Something more is required when a party takes the stand to contradict what he has previously, and deliberately, said under his own hand or, as here, under its own seal. A receipt

is a written acknowledgment of payment and therefore evidence of payment. Moreover, it is evidence of a high order because it is the creditor's admission against interest that the debtor has paid his debt." (p. 392.)

In *Heiskell v. Curtis* (App. D. C.), 259 F. 987, it was said:

"The single assignment of error relates to the burden of proof. It is urged by counsel for defendant that the receipted bill is prima facie evidence of payment, and the burden is upon plaintiff to overcome this presumption. It is undoubtedly the law that a receipt is evidence of a high character as to the truth of its recitals, and while it may be explained by parol evidence, the burden of proof rests upon the one attacking it. Jones on Evidence, Sec. 492." (p. 988.)

In the Texas case of *Luna v. Johnston*, 11 S. W. (2d) 350, the rule is thus stated:

"The deed which conveyed the property in question to appellee was executed five years after he and his wife were married, and recited a cash payment of $500. A recitation of payment in a deed is prima facie evidence that the amount named therein was actually paid, and the burden is upon the person attacking same to show a different consideration. Russell v. Beckert (Tex. Civ. App.), 195 S. W. 607; Robertson v. Hefley, 55 Tex. Civ. App. 368, 118 S. W. 1159; Whitlock v. Barham & Duncan, 172 Ark. 198, 288 S. W. 4." (p. 351.)

In *City of San Saba v. Hudson*, 95 S. W. (2d) 1312,

appellee sued in trespass to try title to recover certain property in the town of San Saba and the city sought by cross action to recover damages on the general warranty of title contained in its deed. The sole question was whether or not there was in fact any consideration for the deed, and the court said:

> *"The recited consideration of* $2,000 *in the deed is sufficient in law, and the burden was upon appellants, particularly the interveners who were liable on their warranty of title to the city of San Saba, to show that there was in fact no consideration for the deed."* (p. 1313.)

The rule is thus stated in *Corpus Juris* (66 C. J. p. 1129, Sec. 964):

> "But purchasers from a grantee are entitled to accept as true express recitals of a deed to their grantor as to the consideration." (66 C. J. 1129.)

IV.

The Honorable Circuit Court of Appeals, in overruling petitioner's assignments directed at the admission of the evidence of F. E. Rogers that the parties did not intend to include the strip of land in controversy in making the partition in 1899, and in considering and giving effect to such evidence, wholly disregarded applicable decisions of the Texas courts, contrary to the rule adopted by this Honorable Court in the Erie Railroad Co. and Ruhlin cases, supra.

Gulf Production Co. v. Warren, 99 S. W. (2d) 616, writ refused.

Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080; 85 A. L. R. 391; also other cases cited under First Proposition, pages 19-21 hereof.

On the trial below F. E. Rogers, one of the heirs of Mrs. Louisa Rogers, who joined in the partition deed February 28, 1899, to J. F. Rogers, testified over petitioner's objection to the surveying by Simmons at the time of the partition, and that when Simmons advised them that there was a chain left over on the west, the two oldest brothers said they would just keep that like it was; they were using that for a road at that time of the year; that a stake was placed at the southeast corner and a gearwheel placed there subsequently, etc. (R. pp. 220-223.) This testimony was considered and given effect by the court on the trial below, as shown by his Findings VI to X (R. pp. 61-65). The Circuit Court of Appeals gave effect to such findings and testimony as shown by its opinion on original submission (R. pp. 332-335).

In doing so such Honorable Circuit Court of Appeals very clearly held directly contrary to the case of *Gulf Production Co. v. Warren*, 99 S. W. (2d) 616, writ ref.; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391, and other cases heretofore cited. In the *Warren* Case, heretofore quoted from, where the controversy involved the inclusion or non-inclusion of a railroad right of way in the description of an oil and gas lease which called to be bounded on the southwest by such right of way, *it was sought to be shown that Mr. Cartwright, the lessor's*

president, went upon the ground and specifically pointed out the tracts to be covered by the lease, which designation did not include the railroad right of way tract. **It was specifically held by the court that such testimony was not admissible, but if received was without probative force in the construction of the lease,** the court citing and relying upon *Rio Bravo Oil Co. v. Weed*, supra, where, it was said, this rule was there given controlling effect. (99 S. W. (2d) 626.)

Of course, rules of evidence in suits in the Federal Courts involving Texas lands are controlled by Texas decisions. (*O'Donnell v. U. S.*, 91 F. (2d) 14; *Olcott v. Bynum*, 17 Wall. (84 U. S.) 44, 21 L. Ed. 570). In *O'Donnell v. U. S.*, supra, the court was considering the admissibility of a copy of a deed from the records of Colusa County in a suit involving the title to California lands, and said

> *"The document should have been excluded, for even had there been a proper search, the copy was not admissible under the California law which controls the admission of evidence in suits in the Federal courts involving title to California lands.*
>
> *"In Olcott v. Bynum* (1872), 17 Wall. (84 U. S.) 44, 21 L. Ed. 570, *the matter under consideration was a land title in North Carolina, and the question was as to the admissibility in evidence of a certified copy of a deed improperly recorded. As to this question the Supreme Court said: 'It is one to be determined by the lex loci rei sitae. It is to be considered solely in the light of the statutes, and adjudications of North Carolina. This court must hold and administer the law upon the subject as if it were sitting as a*

local court of that State.' Olcott v. Bynum, supra, 17 Wall. 44, 57, 21 L. Ed. 570.

"This, of course, is nothing more than a particular application of the general rule that in matters pertaining to real property the law of the situs governs." (pp. 22-23.)

V.

The Honorable Circuit Court of Appeals, in failing and refusing to apply the decisions of the State of Texas concerning the construction of the deed to J. F. Rogers, the lease to W. P. Chandler, the admissibility of evidence to vary the terms of the instruments involved, and in denying to petitioner the benefits of the Texas rule as to the purchase of the legal title and its effect, conflicts with and holds contrary to the decisions of this Honorable Court in Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1187, 114 A. L. R. 1487, and Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290.

(*a*) The Federal Courts follow rules of evidence in the trial of a case involving the title to Texas lands, that have become settled by the decisions of the Texas courts.

O'Donnell v. U. S. (C. C. A. 9 Cal.), 91 F. (2d) 14, 22.

Olcott v. Bynum, 17 Wall. (84 U. S.) 44, 21 L. Ed. 570.

Turner v. California Co. (C. C. A. 5 Tex.), 54 F. (2d) 552.

(*b*) Had the presumption of innocence, value

paid and lack of notice attending the purchase of the legal title been adopted by statute of the State of Texas, the United States Courts of course would undoubtedly have given effect thereto.

Parriso v. Towse (C. C. A. 2 N. Y.), 45 F. (2d) 962.

Turner Simplicity Manufacturing Co. v. Bremner (C. C. A. 8 Ia.), 40 F. (2d) 368.

(*c*) The effect of the *Erie* and *Ruhlin* Cases is to apply to rules of law settled by state decisions, the binding force theretofore accorded by the Federal Courts to statutes.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1187, 114 A. L. R. 1487.

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290.

Unquestionably, had the case below been tried in the Texas courts, effect would have been given to the Texas decisions including the road in controversy as a part of the tract conveyed to J. F. Rogers by his brothers, as the rule is announced in *Mitchell v. Bass*, 26 Tex. 372; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448; *Texas Bitulithic Co. v. Warwick*, 293 S. W. 160, by the Texas Commission of Appeals; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391, and other cases. Just as certainly the testimony of F. E. Rogers in substance that the land in controversy was left out of the partition

intentionally would have been excluded under *Gulf Production Co. v. Warren*, 99 S. W. (2d) 616, writ refused, and *Rio Bravo Oil Co. v. Weed*, supra. Unquestionably, too, the Texas courts would have applied the Texas rule concerning innocent purchaser, and judgment would necessarily have gone for petitioner. It seems also that had the legal presumptions accorded by the Texas courts to the holder of the legal title, of innocence, good faith and value paid, been adopted by statute, such rules would have been followed by the Federal Courts in this case. (*Turner Simplicity Manufacturing Co. v. Bremner* (C. C. A. 8 Ia.), 40 F. (2d) 368; *Parriso v. Towse* (C. C. A. 2 N. Y.), 45 F. (2d) 962). It is our understanding of the decision of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1187, 114 A. L. R. 1487, that it applies to Federal rules of decision announced by the courts of a state, the rule theretofore followed with reference to state statutes. In that case this court said (304 U. S. 78, 82 L. Ed. 1194):

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. **And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.** There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

In *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290, a suit in equity, the same rule was announced for guidance in equity cases, the court saying (304 U. S. 202, 82 L. Ed. 1292):

"* * * The decision in Erie R. Co. v. Tompkins, 304 U. S. 64, ante, 1188, 58 S. Ct. 817, 114 A. L. R. 1487, No. 367, decided April 25, 1938, goes further, and settles the question of power. **The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court. The doctrine applies though the question of construction arises not in an action at law, but in a suit in equity.** Compare Mason v. United States, 260 U. S. 545, 557, 558, 67 L. Ed. 396, 400, 401, 43 S. Ct. 200." (82 L. Ed. 1292.)

Again in the same case, the court said (304 U. S. 208, 82 L. Ed. 1294):

"Application of the 'State law' to the present case, or any other controversy controlled by Erie R. Co. v. Tompkins, does not present the disputants with duties difficult or strange. **The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done in actions brought in the federal courts involving what were known as matters of 'local' law."**

VI.

The Honorable Circuit Court of Appeals for the Fifth Circuit, in affirming the judgment below, in effect granted a reformation of a deed executed in 1899, recorded in 1900, and an oil and gas lease executed and recorded more than four years prior to the filing of the suit, by eliminating from the description of the property conveyed the call for the Wiley Davis northeast corner, which would have included the land in controversy, on pleadings and evidence wholly failing to excuse or explain the delay, such release being accorded to the holder of the equitable title or an equitable right as against the holder of the legal title; and in so doing decided an important question of general law in a way wholly untenable within the meaning of Paragraph (b) of Subdivision 5 of Rule 38 of this Honorable Court.

(*a*) The call for the Wiley Davis northeast corner included the land in controversy, and vested in J. F. Rogers, and petitioner as his remote vendee, legal title thereto.

Swann v. Mills, 219 S. W. 850.
Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69.

(*b*) Recordation of the deed and lease affected all parties with notice of the mistake in the description, if mistake there was.

J. R. Watkins Co. v. Gibbs, 66 S. W. (2d) 355.
Central National Bank v. Barclay, 254 S. W. 140.
Vodrie v. Tyman, 57 S. W. 680.

Martinez v. Guiterrez's Heirs, 172 S. W. 766, writ den.
Calhoun v. Burton, 64 Tex. 510.
Boren v. Boren, 85 S. W. 48, writ den.
Ryman v. Petruka, 166 S. W. 711.
Lant v. Manley, 71 F. 7.
Teall v. Schroder, 158 U. S. 172, 39 L. Ed. 938.

(*c*) Under the statutes of limitation of the State of Texas, an action to reform a deed must be brought within four years after the cause of action accrues.

Art. 5529, 16 *Vernon's Rev. Civ. Stats.* 1925.

(*d*) The doctrine of equitable laches also applies in Texas to such situations.

Connolly v. Hammond, 51 Tex. 635.
Empire Gas & Fuel Co. v. Higgins Oil & Fuel Co. (C. C. A. 5 Tex.), 279 F. 977.

As heretofore shown, the description involved begins at the northwest corner of the W. H. Rogers Tract No. 1 and runs west 440 yards to the Wiley Davis northeast corner; thence south, east, north 12 deg. E, and East to the W. H. Rogers line and north to the beginning. (This deed was dated February 28, 1899, and recorded February 10, 1900, R. p. 205.) The oil and gas lease to W. P. Chandler was dated October 20, 1930, and recorded November 18, 1930 (R. p. 138), the description being identical with the J. F. Rogers deed except that it excepted the 2-acre

tract out of the northeast corner theretofore conveyed by the widow and children of J. F. Rogers to R. M. Wood in 1917 (R. pp. 150-151). This 2-acre tract included the north end of the strip claimed by defendants (see map following p. 16 hereof).

Wiley Davis owned the land adjoining the Mrs. Louisa Rogers land on the west, and the northeast corner of the Wiley Davis tract of land was a well established and well marked and identified corner, witnessed by a pine tree and the east line of the Davis tract was well marked by marked trees. (See testimony of F. E. Rogers, J. E. Sport and Wiley Davis, next hereinafter referred to.)

Petitioner's original petition was filed December 18, 1934 (R. p. 13), and the answer and cross action of the defendants alleging a mistake in the call for the Wiley Davis northeast corner (R. p. 34) was filed January 27, 1936 (R. p. 43).

The 66.89 foot strip of land along the west side of the J. F. Rogers tract No. 2 was adjudged to defendants as not being included in the deed to J. F. Rogers or the lease to W. P. Chandler (R. p. 54-55).

The court found that the call for the Wiley Davis northeast corner in the deed to J. F. Rogers was inserted by mistake. (16th Finding, R. p. 68.) F. E. Rogers, one of the grantors in the deed to J. F. Rogers, testified that he knew where Wiley Davis lived and where the pine tree stood at his northeast corner, and that the old road jogged around the pine tree. He also knew where the Davis east line was and it was marked by marked trees which were cut down

when he built the road. (R. pp. 225-226.) J. E. Sport, a witness for defendants, also testified to the pine tree at the northeast corner of the Wiley Davis tract, and that such pine tree represented the dividing line of the survey at the north. (R. p. 238.)

Although defendants allege the call for the Wiley Davis northeast corner was included by mistake (R. pp. 30-31) no excuse for the long delay in seeking a reformation of the instruments involved is contained in their answer and cross action. (R. pp. 28-43.)

Under *Swann v. Mills*, 219 S. W. 850, and *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69, it is very plain that the legal title to the property involved in this suit vested in J. F. Rogers and through him in petitioner. Such deed must necessarily have been given effect, unless reformed, and the judgment below in adjudging to defendants the tract of land in controversy necessarily had the effect of so doing. Defendants and their predecessors in title were affected with notice of the mistake by the record of the deed and lease and beyond question defendants were not entitled to equitable relief in the way of reformation after a lapse of over thirty years in one instance and over four years in another. The doctrine of laches, if nothing else, would bar such right. (*Connolly v. Hammond*, 51 Tex. 635; *Empire Gas & Fuel Co. v. Higgins Oil & Fuel Co.* (C. C. A. 5), 279 F. 977.)

VII.

It is respectfully prayed that writ of certiorari be granted and that upon hearing of this cause, the judgments below be reversed and judgment rendered for petitioner for the land involved, together with such other relief as it may be entitled to, either at law or in equity.

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DAVID B. TRAMMELL, one of counsel preparing the foregoing brief and petition, hereby certifies that the same is made in good faith; that in his opinion there are good grounds for same and that such petition and brief are not interposed for delay.

DAVID B. TRAMMELL.

In The

Supreme Court of the United States

October Term 1938

CITIES SERVICE OIL COMPANY,
Petitioner

v.

B. P. DUNLAP, ET AL.

No._____

Receipt of a copy of the petition for certiorari and supporting brief and the record is hereby acknowledged, and further notice of the filing and presentation of such petition and brief is waived and the Honorable Clerk of the Supreme Court may submit same within twenty days from the date of filing as provided by Paragraph 3 of Rule 38 of the Supreme Court of the United States.

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1939

No. 28

CITIES SERVICE OIL COMPANY, *Petitioner*

vs.

B. P. DUNLAP, ET AL

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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Brief on Behalf of Petitioner on Submission of Cause

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Disregarding for the moment the call for the Wiley Davis Northeast corner, and construing the deed according to Texas decisions, title to the road passed to J. F. Rogers and petitioner subject to the easement, because the land described went to and was bounded by the road, and the deed and lease did not expressly reserve title in grantors and lessors. Parol evidence was not admissible to show the grantors intended to reserve title to the road, or set stakes not called for in their deeds. The Texas decisions create rules of property to be followed by Federal Courts.	
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The court erred in holding there was no showing of consideration paid for the oil and gas lease, for it is well settled in Texas that an instrument reciting $1.00 paid with obligations expressed or implied to drill offset wells, sufficiently shows on its face a consideration. Such is not only the rule in Texas but it is the majority rule and the one applied by the Federal Courts.

FOURTH POINT 56–58

The Honorable Circuit Court of Appeals erred in affirming a judgment which is effect granted a reformation of a deed executed in 1899, recorded in 1900, and an oil and gas lease executed and recorded more than four years prior to the filing of the suit, by eliminating from the description of the property conveyed the call for the Wiley Davis

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Northeast corner, which would have included the land in controversy, the pleadings and evidence wholly failing to excuse or explain the delay, such relief being accorded to the holder of the equitable title or an equitable right as against the holder of the legal title, for the reason that the asserted cause of action was barred by the statutes of limitation of Texas and equitable laches.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 28

CITIES SERVICE OIL COMPANY, *Petitioner*

vs.

B. P. DUNLAP, ET AL

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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Brief on Behalf of Petitioner on Submission of Cause

OPINIONS OF COURT BELOW

Original opinion rendered by the Fifth Circuit on December 8, 1938, is reported in 100 Fed. (2d) 294, and opinion on rehearing rendered on February 24, 1939, is reported in 101 Fed. (2d) 314.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

1. The jurisdiction of this court is based upon *Judicial Code, Section* 240, *as amended by the Act of February* 13, 1925, 43 *Stats.* 938; (*U. S. C. A. Title* 28, *Sec.* 347), *and Rule* 38, *paragraph* 5, *Subdivision* (*b*) *of this Honorable Court*, the Honorable Circuit

Court of Appeals having failed and refused to apply the decisions of the Supreme Court of Texas concerning the construction of the deed to J. F. Rogers, the lease to W. P. Chandler, the admissibility of evidence to vary the terms of the instruments involved, and the benefits to petitioner as holder of the legal title to the land in controversy of presumptions of good faith, innocence and value paid, thereby rendering an opinion conflicting with and contrary to the decisions of this court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64; *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202; *Hudson v. Monnier*, 304 U. S. 397; *Massachusetts v. New York*, 271 U. S. 65; *Edward Hines Yellow Pine Trustees v. Martin*, 268 U. S. 458; *Mason v. U. S.*, 260 U. S. 545; *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349; *Hardin v. Jordan*, 140 U. S. 371; *Olcott v. Bynum*, 17 Wall. 44, and *Central Vermont Railway Co. v. White*, 238 U. S. 507, **(in which latter case it was held state decisions placing the burden on plaintiff to prove freedom from contributory negligence created substantive rights)** in the following particulars:

(a) The Honorable Circuit Court, in holding that for grantors to retain title to the road, it was not necessary for their conveyance to expressly reserve title in them since it made no mention of the road, wholly disregarded the applicable Texas cases of *Mitchell v. Bass*, 26 Tex. 372; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448; *Texas Bitulithic Co. v. Warwick* (Tex. Com. App.), 293 S. W. 160; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, 85 A. L. R. 391; *Amerman v. M. K. & T. Ry.*

Co., 182 S. W. 54, and other cases which hold that where there is a conveyance of land adjacent to or adjoining a roadway, whether public or private, title to the road passes to the grantee by virtue of such conveyance unless there is in the conveyance language expressly rebutting such construction or specifically indicating a contrary intent (there being no such language in the instant deed (R. 105-106), it being immaterial in this connection that the road was never opened or was only used in part or that it was abandoned. *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448, *Amerman v. M. K. & T. Ry. Co.*, 182 S. W. 54.

(b) The Honorable Circuit Court, in holding that the deed to J. F. Rogers and the oil and gas lease from his heirs to W. P. Chandler, which was owned by petitioner, did not pass title to the road to such grantee, lessee and assignee, held contrary to the case of *Paine v. Consumers Forwarding and Storage Co.* (6 C. C. A. Ohio), 71 Fed. 626, opinion by Judge Taft, and the case of *Roxana Petroleum Corporation v. Sutter* (8 C. C. A. Kan.), 28 Fed. (2d) 159, in each of which cases it was held that the conveyance of a tract of land adjacent to a road or right of way passed title to such road in the absence of a clear intent to the contrary.

(c) The Honorable Circuit Court in overruling petitioner's assignment of error directed to the admission over its objection of the testimony of F. E. Rogers, which was in substance that after the surveyor had measured West 440 yards he advised the

heirs there was a chain left over, and two of the heirs stated they would keep the 66 feet like it was, it then being used for a road, and in giving effect to such testimony by excluding the land in controversy from the deed and lease under which petitioner claimed, wholly disregarded the Texas cases of *Gulf Production Company v. Warren*, 99 S. W. (2d) 616, writ refused, and *Rio Bravo Oil Company v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, and other cases establishing the contrary rule, i. e., title to a road adjacent to a tract conveyed passes to the grantee unless there is language in the conveyance expressly reserving title to the road or specifically indicating a contrary intent, in the absence of which reservation parol testimony is not admissible to show the grantor intended to reserve title to the road.

(d) The Honorable Circuit Court, in holding that petitioner was not entitled to the protection afforded a bona fide purchaser of a legal title against equitable claims and titles because it failed to plead and prove it was a bona fide purchaser of such legal title (the court recognizing petitioner owned the legal title of the land up to the Wiley Davis Northeast corner under applicable Texas cases of *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69, and *Swann v. Mills*, 219 S. W. 850), wholly disregarded the applicable Texas cases of *Ritch v. Jarvis*, 64 S. W. (2d) 831; *R. B. Godley Lbr. Co. v. Teagarden*, 135 S. W. 1109, aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973; *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69; *Patty v. Middleton*, 82 Tex. 586, 17 S. W.

909, which hold that in Texas the ownership of the legal title is attended with a presumption of innocence, good faith and value paid, and the burden is on the holder of the equitable title to plead and prove that the holder of the legal title had notice of the equity or was a purchaser mala fide or that a valuable consideration was not paid;[1] the applicable Texas cases of *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied, and *Bailey v. Shell Petroleum Corporation*, 95 S. W. (2d) 982, writ denied,[2] which hold that oil and gas leases reciting a dollar consideration and and containing express and implied obligations to drill offset wells are sufficient considerations; the applicable Texas cases of *Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ denied (citing *Kelly v. Jackson*, 6 Pet. 622, 623); *Russell v. Beckert*, 195 S. W. 607; *Luna v. Johnston*, 11 S. W. (2d) 350, and *City of San Saba v. Hudson*, 95 S. W. (2d) 1312), which hold that the recitation of a consideration paid is sufficient proof of consideration when not rebutted; and the applicable Texas cases of *Emde v. Johnson*, 214 S. W. 575, writ denied; *Hitson v. Gilman*, 220 S. W. 140; *McKay v. Tally*, 220 S. W. 167; *McKay v. Lucas*, 220 S. W. 172; *McKay v. Kilcrease*, 220 S. W. 177; *Johnson v. Russell*, 220 S. W. 352, writ denied; *Lone Star Gas Co. v. McCullough*, 220 S. W. 1114;

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[1]The Honorable Circuit Court of Appeals for the Fifth Circuit itself has held this to be a rule of property in Texas. (*Turner v. California Co.*, 54 F. (2d) 552, 553.)

[2]Refusal of the writ in these two cases by the Supreme Court of Texas is an approval by such court of the opinion of the Court of Civil Appeals, under the express provisions of Art. 1728, 3 *Vernon's Ann. Civ. Stats.* of 1925, Pamph. Supp.; Acts 1927, 40th Leg., par. 214, ch. 144, sec. 1.

Leath v. Humble Oil & Refining Company, 223 S. W. 1022; *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied; *Bailey v. Shell Pet. Corp.*, 95 S. W. (2d) 982, writ denied (these cases being founded on *Quebe v. Gulf C. & S. F. R. R. Co.*, 98 Tex. 6, 81 S. W. 20), which hold that $1.00 is sufficient consideration for an oil and gas lease such as that held by petitioner.

(e) The Honorable Circuit Court of Appeals, in holding that the recital of $10.00 paid in the lease to Chandler was not evidence of the payment of consideration, also conflicted with the Federal court cases of *New York Life Ins. Co. v. Seifris* (3 C. C. A. Pa.), 46 F. (2d) 391; *Heiskell v. Curtiss* (App. D. C.), 259 F. 987; *Stowe v. Belfast Savings Bank*, 92 F. 90, aff. (1 C. C. A. Me.), 92 F. 100, and also disregarded a salutary rule of general effect in the United States since the earliest times (*Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B 360), and many cases cited in Note, where it was said that the lease was supported by a valuable consideration "as it recites the payment of $1.00 down. * * * Look back at hundreds of deeds through hundreds of years and you will find them stating $1.00 as a valuable consideration. To say that such a consideration acknowledged under seal is not good would be to overthrow myriads of deeds." (Ann. Cas. 1912 B, p. 361.)

(f) The Honorable Circuit Court of Appeals decided an important question of local law in a way untenable within the meaning of paragraph 5 of Rule 38 of this Honorable Court in that the effect

of the holding of the Circuit Court is to grant defendants a reformation of a deed executed in 1899 and a lease executed in 1930, in a suit to quiet title by petitioner filed December 18, 1934 (R. 13) and a cross action filed by defendants on January 27, 1936 (R. 43). Under the statutes of limitation of the State of Texas (Art. 5529, 16 Vernon's Rev. Civ. Stats. of 1925) an action to reform a deed must be brought within four years after the cause of action accrued, and the Texas courts hold that grantors in a deed are affected with notice of a mistake in the description upon the recordation thereof. (*J. R. Watkins Co. v. Gibbs*, 66 S. W. (2d) 355; *Central National Bank v. Barclay*, 254 S. W. 140; *Vodrie v. Tyman*, 57 S. W. 680; *Martinez v. Gutierrez's Heirs*, 172 S. W. 766, writ denied; *Calhoun v. Burton*, 64 Tex. 510; *Boren v. Boren*, 85 S. W. 48, writ denied; *Ryman v. Petruka*, 166 S. W. 711. See *Lant v. Manley*, 71 F. 7; *Teall v. Schroder*, 158 U. S. 172.) In this connection also the doctrine of equitable laches applies in Texas to such situation (*Connolly v. Hammond*, 51 Tex. 635; *Empire Gas & Fuel Co. v. Higgins Oil & Fuel Co.* (5 C. C. A. Tex.), 279 F. 977).

STATEMENT OF THE CASE

Petitioner by assignment (R. 172-174) and succession (R. 49-52) was the owner of a producing oil and gas lease[1] made in 1930 by the heirs of J. F. Rogers to W. P. Chandler on a tract of land in Gregg County described therein as follows (R. 138-144):

> Being a part of the G. A. Thomas H. R. Starting at the N. E. cor. of Lot No. 2, which is the NW cor. of W. H. Rogers Tract Lot No. 1 **running West 440 yards to Wily Davis NE. corner;** thence S. 880 yds; thence East 224 yards; thence North 310 yards at 12° East of North; then East 754[2] yards to W. H. Rogers line; thence North 572 yards to starting point, containing 68-1/5 acres, more or less, and being the same land described in a deed from J. W. Rogers, W. H. Rogers and F. E. Rogers to J. F. Rogers, Feby. 28, 1899, rec. Vol. 'R', p. 59-60 Deed Records of Gregg County, Texas, save and except 2 acres out of the NW. cor. sold to R. M. Wood, it being the intention to include all land owned or claimed by lessor in said surveys.

Petitioner claimed that its property extended all the way from the Northwest corner of the W. H. Rogers tract on the East to the **Wiley Davis Northeast** corner on the West (excepting a two acre tract sold to R. M. Wood out of the Northwest corner) because

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[1]Which instrument in Texas vests in the lessees a defeasible fee simple title to seven-eighths of the oil, gas and minerals (*Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566; *W. T. Waggoner Est. v. Sigler Oil Co.*, 118 Tex. 509, 19 S. W. (2d) 27).

[2]It was agreed that the figure 754 yards indicated in the abstract should be 154 yards. (R. 106.)

the deeds and leases under which it held title called for these two adjoinders (R. 20-28)[1].

Although petitioner's lease had been of record since November 18, 1930 (R. 138), defendant B. P. Dunlap obtained an oil and gas lease on October 10, 1934, upon a narrow strip of land claimed by petitioner, as a part of its lease, about 66 or 68 feet wide and 880 feet long lying East of and contiguous to the Wiley Davis Northeast corner and East line (less the R. M. Wood 2 acre tract) from the heirs of J. F. Rogers and his three brothers, W. H. Rogers, F. E. Rogers and J. W. Rogers (R. 246-253). The four Rogers brothers, being all of the heirs of Louisa Rogers (R. 61 ¶ 4), owned on February 28, 1899, the East one-half of the Thomason Survey, rated as 320 acres (R. 103-104; 60 ¶ 3; 61 ¶ 5), which included the 68 foot strip in controversy (R. 67 ¶ 14). They, in February, 1899, divided it by assigning to **J. F. Rogers a tract in the Northwest corner, using the same description set out above contained in the oil and gas lease held by petitioner** (R. 105-106); to W. H. Rogers a tract in the Northeast corner (R. 106-107) and to F. E. Rogers and J. W. Rogers the South portion of said East one-half (R. 108-109). The lease they made in 1934 to Dunlap rested on the theory that a strip of land 66 or 68 feet wide along the West side of the 320 acre tract was left undivided in 1899, they claiming in this connection that the call for the **Wiley Davis Northeast** corner was mistakenly and in-

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[1]The rule in Texas is that calls for adjoinder must prevail over calls for distance (*Van Camp v. Gulf Production Co.*, 122 Tex. 383, 405; 61 S. W. (2d) 773, 782; *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69).

advertently inserted in the partition deed to J. F. Rogers because they intended to leave the 66 foot strip for a road (R. 31, 34, 35). The Wiley Davis Northeast corner as located on the ground, a well known and established corner (R. 220-223; 201-204; 225-226; 227; 294; 112; 182-184; 189-190; 263; 237-240) was 66 feet further West than the called distance of 440 yards contained in the partition deed to J. F. Rogers and petitioner's oil and gas lease (R. 63) (so recognized by the Circuit Court of Appeals in its opinion (R. 331, middle of page).

Petitioner filed its bill in equity to quiet title and remove the cloud cast on its title by the filing of the Dunlap lease, making Dunlap and all the Rogers and their heirs parties (R. 20-28). Defendants answered, admitting the execution of the partition deed to J. F. Rogers and alleging that when the partition deed was made in 1889 the Rogers' heirs had a surveyor run the North line of the tract and the surveyor stopped at 880 yards West of the Northeast corner of the Thomason Survey and 440 yards West of the Northwest corner of W. H. Rogers tract No. 1; that it was then known that such point was not a common point with the land owned by Wiley Davis, but the surveyor stopped and fixed the corner at 440 yards at the direction of the partitioners (R. 31) purposely so that they could at all times have an outlet to the main public road, leaving a strip on the West side unpartitioned so that they would have such outlet (R. 35); that the call for the Wiley Davis Northeast corner was inserted through inadvertence and mistake (R.

34). They filed cross-actions, alleging that the heirs of J. F. Rogers leased in **good faith** to W. P. Chandler the land described in the lease dated October 20, 1930, but that the lease did not include the 66 foot strip claimed by petitioner and owned by them (R. 37).

Petitioner answered the cross-action alleging that if the Wiley Davis Northeast corner was inserted through mistake, nevertheless the title to the strip passed to petitioner and its predecessor in title, J. F. Rogers, because the called distance of 440 yards extended to the edge of the road (R. 45).

The trial court made findings of fact and conclusions of law (R. 58-72) to which petitioner excepted (R. 73-81), filed request for additional conclusions (R. 81-91) and appealed (R. 299-328). A map interpreting the court's findings of fact is reproduced at the end of this brief.

The District Court concluded as a matter of law that extrinsic evidence was admissible to show that at the time the surveyor made the partition survey in 1899, he placed stakes at the called distances, the stake he placed at the Northwest corner of the J. F. Rogers tract being East of the Wiley Davis corner 66 feet; that extrinsic evidence was admissible to show that one of the stakes had been removed and a gear shaft placed in its stead, and that such parol testimony was admissible, even though the stakes and gear shaft were not called for in any of the instruments in petitioner's chain of title (R. 68 ¶ 16). The trial court found that while the survey was being

made the Rogers heirs informed the surveyor that they would leave the 66 foot strip out of the partition and use the same jointly and keep it like it was; that the 66 foot strip was then being used in part as a logging road (R. 63); that J. F. Rogers never acquired title under the partition deed to the strip of land situated between the Wiley Davis Northeast corner and the called distance of 440 yards in the deed (R. 67 ¶ 14). The title was accordingly quieted in the defendants. **Petitioner was not seeking to develop the road for oil production, although defendants were.**

The questions presented to this court were duly raised in the trial court by exceptions to the testimony, the court's findings and by request for additional findings, and in the briefs and motions for rehearing in the Circuit Court of Appeals.

SPECIFICATIONS OF THE ASSIGNED ERRORS INTENDED TO BE URGED

(1) The Honorable Circuit Court erred in failing to follow the applicable cases of the Texas Supreme Court and the Courts of Civil Appeals which hold that where there is a conveyance of the land adjacent to or adjoining the roadway, whether public or private, title to the road passes to the grantee by virtue of such conveyance unless there is in the conveyance language expressly rebutting such construction or specifically indicating a contrary intent, it being immaterial in this connection that the road was never opened or that it was abandoned. In failing to follow

the rules of property in Texas the court overruled petitioner's assignment of errors I, II and IV (R. 302-305; 305-307).

(2) The Honorable Circuit Court, in overruling petitioner's assignments of errors I, III and IV (R. 302-303; 305-307) directed to the admission over its objection of the testimony of F. E. Rogers which was in substance that after the surveyor had measured West 440 yards he advised the heirs there was a chain left over and two of the heirs stated they would keep the 66 feet like it was, it then being used for a road, and in giving effect to such testimony by excluding the land in controversy from the deed and lease under which petitioner claimed, wholly disregarded the decisions of the Texas Supreme Court and the Courts of Civil Appeals, establishing the contrary rule, i. e. title to a road adjacent to a tract conveyed passes to the grantee unless there is language in the conveyance expressly reserving title to the road or specifically indicating a contrary intent, and in the absence of which, parol testimony is not admissible to show grantor intended to reserve title to the road.

(3) The Honorable Circuit Court erred in holding that the petitioner was not entitled to the protection afforded a bona fide purchaser of a legal title against equitable claims and titles, because it failed to plead and prove it was a bona fide purchaser of such legal title; also in holding the Texas rule that the burden of proof is on the holder of the equitable title to plead and prove that the holder of the legal title is a mala fide purchaser since the ownership of the legal title is

attended with a presumption of innocence, good faith and value paid, was a matter of practice or procedure, not being controlled by *Erie Railroad Company v. Tompkins and Ruhlin v. New York Life Insurance Company.* The decision conflicts with *Central Vermont Ry. Co. v. White,* 238 U. S. 507. In so holding the court overruled petitioner's assignment of errors III, IV, V, VI and XII (R. 302-320)..

(4) The Honorable Circuit Court erred in holding on rehearing that petitioner failed to prove it paid a valuable consideration for the lease, the law in Texas being a recital of $1.00 and the obligations in a lease to drill offset wells is a sufficient consideration, and recitations of a consideration paid is sufficient proof of consideration when not rebutted.

(5) The Honorable Circuit Court erred in affirming the judgment of the trial court which reformed a deed executed in 1899, and a lease executed in 1930 in a suit filed by petitioner in 1934, and a cross-action filed by defendants in 1936, because the action to reform such instruments was barred by the statute of limitation of Texas and equitable laches as defined by the Texas Courts. In affirming the case the court overruled petitioner's assignment of errors III, IV and XI (R. 305-307; 316).

The above errors were assigned in the petition for certiorari and supporting brief filed in this court, and in the Circuit Court in the First and Second Motions for Rehearing (R. 341-363; 370-390) and were raised in the District Court (R. 302-320).

SUMMARY OF ARGUMENT

This case presents important questions as to the extent and applicability of this Honorable Court's recent opinions in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, and *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, the Circuit Court having expressly held that under these cases a Federal equity court is not required to follow the law announced by the Supreme Court of Texas that the ownership of the legal title is attended with presumptions of innocence, good faith and value paid, and that the burden is on the holder of the equitable title to plead and prove the holder of the legal title had notice of the equity or was a purchaser mala fide or did not pay a valuable consideration. The Circuit Court further held that these beneficial presumptions were matters of practice or procedure and not matters of substantive law because the presumptions were not created by Texas statutes but by decisions of the Supreme Court. We contend that in order to have uniformity in the relief granted in the state courts and Federal courts, the latter courts sitting in equity, in passing on titles to Texas land are required to grant relief according to rules of equity prescribed by state statutes or recognized by Texas Supreme Court decisions, for a departure from the established Texas rules of equity would introduce confusion, disturbance and uncertainty in Texas land titles. Under Texas decisions constituting rules of property and recognized rules of equity, petitioner was entitled to a decree since it held the legal title and defendants

failed to plead and prove petitioner was a mala fide purchaser and we therefore urge that these decisions constitute the substantive law of Texas. The burden so cast by Texas decisions on the holders of the equitable title are essential parts of their cause of action or defense, just as much as is the burden on the plaintiff in certain states to plead freedom from contributory negligence as a part of his cause of action, and this court, in *Central Vermont Co. v. White*, 238 U. S. 507, held state decisions so casting the burden of pleading and proving contributory negligence were not matters of state procedure but of substantive law. (For discussion see Second Point, pp. 41-51 hereof.)

In construing the partition deed to J. F. Rogers and the oil and gas lease held by petitioner, on questions concerning the amount and location of the land conveyed, the Federal Court should have followed the decisions of the Texas Supreme Court (*Kuhn v. Fairmont Coal Co.*, 215 U. S. 349; *Massachusetts v. New York*, 271 U. S. 65). Likewise it should have followed the decision of the state court on questions involving the admissibility of evidence (*Olcott v. Bynum*, 17 Wall. 44), because the Texas decisions constitute rules of property (*Edward Hines Yellow Pine Trustees v. Martin*, 268 U. S. 458). The fact this is an equitable action does not militate against the rule (*Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202; *Mason v. U. S.*, 260 U. S. 545). (For discussion see First Point, pp. 22-41 hereof.)

Disregarding for the moment the call for the Wiley

Davis Northeast corner, it is certain that in all events the land described in the partition deed to J. F. Rogers would go to and be bounded by the road, which F. E. Rogers, one of the defendants, testified ran along the strip of land in controversy and, under Texas decisions construing such deeds, title of grantors passed to the grantee, it being a rule of property in Texas that title to the roadway under such circumstances passes to the grantee unless expressly reserved in the instrument. (*Mitchell v. Bass*, 26 Tex. 372; *Texas Bitulithic Co. v. Warwick* (Tex. Com. App.), 293 S. W. 160; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080, cer. den. 288 U. S. 603; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448; *Gulf Production Co. v. Warren*, 99 S. W. (2d) 616, writ ref.; *Amerman v. M. K. & T. Ry. Co.*, 182 S. W. 54, writ denied.) **It is immaterial, so far as the title is concerned, that the road was never opened or that it was abandoned or that the travel did not extend from one fence to another.** (*Amerman v. M. K. & T. Ry. Co.*, 182 S. W. 54, writ denied; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448.)

The same rule has been announced by two Circuit Courts of Appeal of the United States. (*Paine v. Consumer's Forwarding & Storage Co.* (6 C. C. A. Ohio), 71 F. 626; *Roxana Pet. Corp. v. Sutter* (8 C. C. A. Kan.), 28 F. (2d) 159.

The rule is applicable to alleys and private ways (*Weiss v. Goodhue*, 102 S. W. 793, writ ref.; *Guadalupe County v. Poth*, 163 S. W. 1050; *Pecos & N. T. Ry. Co. v. Falls*, 96 S. W. (2d) 430; *Paine v. Con-*

sumer's Forwarding & Storage Co. (6 C. C. A. Ohio), 71 F. 626), **and to partition deeds, and oil and gas leases, as well as other conveyances** (*Amerman v. M. K. & T. Ry. Co.*, 182 S. W. 54, writ ref.; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448).

The partition deed to J. F. Rogers having called for the Wiley Davis Northeast corner, the location of which was well known to the Rogers heirs (being at the extreme Northwest corner of the property they were partitioning), evidenced an intention on their part to pass title to the road, subject to the easement to J. F. Rogers, and their failure to expressly reserve title in themselves made the presumption conclusive. The inclusion in the oil and gas lease by the heirs of J. F. Rogers to W. P. Chandler, which petitioner acquired by assignment, the general clause **"it being the intention to include all land owned or claimed by lessor in said surveys"** certainly evidenced an intention on their part to divest them of their title to all land they owned in the survey.

The presumption being conclusive, parol testimony therefore was not admissible to show that the heirs intended to leave unpartitioned the 66 foot strip being used as a road (petitioner not admitting that the parol testimony introduced did show they intended to leave the strip unpartitioned) and parol testimony was not admissible to show the surveyor set stakes short of the called distance because such objects were not mentioned in any of the instruments in petitioner's chain of title. (*Gulf Production Co.*

v. Warren, 99 S. W. (2d) 616, writ ref.; *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080.) (For discussion see First Point, pp. 22-41 hereof.)

The partition deed to J. F. Rogers vested him with the legal title to all land lying between the Northwest corner of Tract No. 1, partitioned to W. H. Rogers and the Northeast corner of the Wiley Davis Tract because the two adjoinders were called for in his deed and their locations were known to the surveyor and the Rogers heirs. (*Garrison v. Crowell*, 67 Tex. 626; 4 S. W. 69; *Swann v. Mills*, 219 S. W. 850; *Miller v. Southland Insurance Co.*, 68 S. W. (2d) 558.) If the grantors conveyed more land than they intended they had only an equitable right to reform the deed which they executed in 1899, and having failed to assert such equitable right of reformation for more than thirty years until petitioner acquired the legal title to the oil and gas leasehold estate based on the partition deed of record, they could not defeat the legal title without pleading and proving petitioner was a mala fide purchaser, for the rule in Texas, well established by the decisions of the Supreme Court, is that the purchase of the legal title is attended with a presumption of innocence, good faith and value paid, the burden resting on the holder of the equitable title to show to the contrary. (*Ritch v. Jarvis*, 64 S. W. (2d) 831; *R. B. Godley Lbr. Co. v. Teagarden*, 135 S. W. 1109, aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973; *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909; *White v. Hicks*, 104 S. W. (2d) 136; *Love v. Allday*, 106 S. W. (2d) 830, writ dismissed; *Kenedy v. State*, 196 S. W. 287; affirmed,

111 Tex. 200, 231 S. W. 683, cer. den. 258 U. S. 617; *Davidson v. Renfro*, 114 S. W. 449), **this being the rule in Texas even where the action is brought by the legal title holder.** (*Catrett v. Brown Hardware Co.*, 86 S. W. 1045; *Brown Hardware Co. v. Catrett*, 101 S. W. 559, writ dismissed; *Middleton v. Johnson*, 110 S. W. 789; *Ratcliffe v. Mahres*, 122 S. W. (2d) 718.) (For discussion see Second Point, pp. 41-51 hereof.)

The burden was not on petitioner to prove it paid a valuable consideration for the oil and gas lease, but if it was it discharged this burden because of the recitals contained in the oil and gas lease and the assignment to petitioner of a consideration paid and the express and implied obligations to drill offset wells. (*Jones v. Bevier*, 59 S. W. (2d) 945, writ den.; *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, writ den.) **The recitation of $10.00 paid in the W. P. Chandler lease was itself sufficient.** (*Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ den.; *Russell v. Beckert*, 195 S. W. 607; *Luna v. Johnston*, 11 S. W. (2d) 350; *City of San Saba v. Hudson*, 95 S. W. (2d) 1312; *Kelly v. Jackson*, 6 Pet. 622, 632, 8 L. Ed. 523 (cited in *Moss-Tate Inv. v. Owens, supra*), **and the recital of $1.00 paid is in Texas sufficient consideration to support an oil and gas lease.** (*Emde v. Johnson*, 214 S. W. 575, writ den.; *Hitson v. Gilman*, 220 S. W. 140; *McKay v. Tally*, 220 S. W. 167; *McKay v. Lucas*, 220 S. W. 172; *McKay v. Kilcrease*, 220 S. W. 177; *Johnson v. Russell*, 220 S. W. 352, writ den.; *Lone Star Gas Co. v. McCullough*, 220 S. W. 1114; *Leath v. Humble Oil*

& Refining Co., 223 S. W. 1022; *Jones v. Bevier*, 59 S. W. (2d) 945, writ den.; *Bailey v. Shell Pet. Corp.*, 95 S. W. (2d) 982, writ den.; *Quebe v. Gulf C. & S. F. RR. Co.*, 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734, 1 Ann. Cas. 545.

Federal Courts hold that the receipt of money in an instrument is prima facie evidence of payment of consideration. (*New York Life Ins. Co. v. Seifris* (3 C. C. A. Pa.), 46 F. (2d) 391; *Heiskell v. Curtiss* (App. D. C.), 259 F. 987; *Stowe v. Belfast Savings Bank*, 92 F. 90, aff. (1 C. C. A. Md.) 92 F. 100, and this seems to be the better rule supported by the weight of authority. (*Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707; Ann. Cas. 1912B, 360 and note. (For discussion see Third Point, pp. 51-56 hereof.)

The Honorable Circuit Court, in affirming the judgment, in effect granted a reformation of a deed executed in 1899, recorded in 1900, and an oil and gas lease executed and recorded more than four years prior to the filing of the suit, by eliminating from the description of the property conveyed the call for the Wiley Davis Northeast corner, which would have included the land in controversy, on pleadings and evidence wholly failing to excuse or explain the delay, such relief being accorded to defendants claiming an equitable title or right as against the holder of the legal title, even though defendants' asserted cause of action was bared by the four year statute of limitations of Texas (Article 5529, 16 *Vernon's Rev. Civ. Stats.* 1925), and the doctrine of equitable laches (*Connolly v. Hammond*, 51 Tex. 635; *Empire*

Gas & Fuel Co. v. Higgins Oil & Fuel Co. (5 C. C. A. Tex.), 279 F. 977. (For discussion see Fourth Point, pp. 56-58 hereof.)

ARGUMENT

FIRST POINT

Disregarding for the moment the call for the Wiley Davis Northeast corner, and construing the deed according to Texas decisions, title to the road passed to J. F. Rogers and petitioner subject to the easement, because the land described went to and was bounded by the road, and the deed and lease did not expressly reserve title in grantors and lessors. Parol evidence was not admissible to show the grantors intended to reserve title to the road, or set stakes not called for in their deeds. The Texas decisions create rules of property to be followed by Federal Courts.

The Honorable Circuit Court in its opinion stated:

> "The court properly heard the testimony of persons who were present at the survey, and it clearly showed that the northwest corner of Lot No. 2 was deliberately and purposely put about a chain's length east of the Wiley Davis corner so as to leave a strip undivided and under the control of all four tenants in common for the purpose of a road." (R. 334-335.)

This being true, the called distance of 440 yards extended to the edge of the strip of land the heirs set aside for a road, and title to the road passed to J. F. Rogers because the partition deed contained no express reservation of the road in grantors. **An unexpressed intention to reserve title is not sufficient; the reservation must be in the deed.** The Circuit Court, after holding that under settled rules of law a conveyance of land adjoining a road will carry the grantor's title to the servient fee of the road because of the presumption based on public policy that parties would not reserve a long narrow strip for which they had no use, then erred in holding that "if the intention to do so is clear (meaning reserve title to the road) the contrary presumption must yield," for the court failed to limit the exception to the rule to **"an intention expressed in the instrument."**

The court likewise erred in holding "There is a plainly **expressed** intention not to add the strip to Lot No. 2 but to retain joint control and ownership. Since the deed as prepared said nothing about a road as a boundary, there was no occasion to make a **reservation** of the land * * *." If there was no occasion to make a reservation of the land in the deed to J. F. Rogers (and none was made, see deed (R. 105), then there was no "expressed intention" in the deed not to add the strip to Lot No. 2.

A purchaser from the heirs of J. F. Rogers and their lessees, such as was petitioner, could not glean from the partition deed and the oil and gas lease subsequently acquired by petitioner, that the four Rogers

heirs intended to reserve title to the road, particularly in light of the fact that each of these instruments contained a call for the Wiley Davis Northeast corner, which in itself would have included the road, and the called distance of 440 yards extended to the edge of the large public road in use when the lease was executed, and no mention was made in the instrument of a reservation of title to the road. Any intention on the part of the Rogers heirs to reserve title to the road must be gathered from the conversation they had in 1899 when the survey was being made and not from the deed.

Authorities holding title to road passes unless expressly reserved in the deed.

One of the earliest Texas cases is that of *Mitchell v. Bass* (1862), 26 Tex. 372, wherein the court said:

> "The established doctrine of the common law is, that a conveyance of land bounded on a public highway, carries with it the fee to the center of the road, as part and parcel of the grant. **Such is the legal construction of the grant, unless the inference that it was so intended, is rebutted by the express terms of the grant.** The owners of the land on each side, go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. Upon the discontinuance of the highway, the soil and freehold revert to the owner of the land." (p. 380.)

The *Bass* case was cited and followed in *Texas Bitulithic Co. et al v. Warwick*, 293 S. W. 160, where

the Supreme Court Commission of Appeals of Texas construed a deed to city lots bounded by a street, calling for a distance that extended to the inner edge of the street and for stakes that had been set along the inner edge of the street, as conveying title to one-half of the street because not expressly reserved, and the following was said in the opinion:

"'The presumption of an intent to convey title to the center of a street or highway is not overcome by the fact the land is described by metes and bounds, and that the distances stated in the description of the deed do not extend to the center of the street.' We think the weight of the better reasoned authorities in other jurisdictions is contrary to the decision of that Court of Civil Appeals herein. We are of the view that the correct rule was referred to by Chief Justice Wheeler in the Bass case, supra, when he said that title extends to the center of the street unless the express terms of the grant show a contrary intention. A very thoroughly considered case upon this point is that of Bowers v. Railway Co. by the Supreme Court of Kansas reported in 119 Kan. 202, 237, p. 913, 42 A. L. R. 229. In that case the court said:

"'This court has approved the doctrine that to exclude half of the highway from a conveyance the grantor must make his purpose to exclude clear by **express declaration,** or equivalent of express declaration, **in the instrument.**' In the case of Tousley v. Galena M. & S. Co., 24 Kan. 328, the opinion was written by Justice Brewer, later of the United States Supreme Court. In the Galena case he held that, unless the road or street be expressly excluded, the

grantee takes to the center thereof." (pp. 162-163.) * * *

"We quote as follows from the case of Marsh v. Burt, 34 Vt. 289:

" 'Parties have the right to make their conveyances as they choose, and when the intention to exclude the highway is clear, explicit and unequivocal, it is the duty of the court to carry out their intention, but **when the language is such that by a fair construction the intent is doubtful, it is the duty of the court to resolve that doubt so as to give to the deed the effect of conveying the land to the center of the highway.'** (p. 163.)" * * *

"Therefore we think the courts are exactly right when they say that a deed does carry the property to the center of the adjoining street unless such deed contains a clause which **expressly declares the contrary intention** or contains some other declaration equivalent to such an express declaration. **In other words, we think that the purchaser of a lot should be put definitely upon notice that he has no rights in the sidewalk and street in front of his property, if that is the intention of the grantor.** * * *." (p. 164.)

The *Warwick* case was cited and followed in *Rio Bravo Oil Company et al v. J. F. Weed, et al*, 121 Tex. 427, 50 S. W. (2d) 1080, cer. den. 288 U. S. 602, when the court applied the same principle of law to a railroad right of way. In the *Weed* case the facts revealed the heirs partitioned a 52 acre tract into eight lots, and a plat of the subdivision showed the boundaries of the lots, the acreage of each and their location with reference to the right of way. The

heirs executed partition deeds describing the tracts by lot numbers. In holding the title to the right of way passed because the lots adjoined it, the court said:

> "In other words, when a person conveys a piece of property abutting upon a public highway or nonnavigable stream it is but natural to assume, **in the absence of an express reservation to the contrary,** that he intends to convey the same with all of the beneficial rights enjoyed by him in its use. Such benefits and advantages are usually of compelling force in inducing the sale of the property." (50 S. W. (2d) 1084.)

The Weed case was cited and followed the opinion in *Roxana Petroleum Corporation v. Sutter, et al* (8 C. C. A. Kan.), 28 Fed. (2d) 159, the court holding that the servient estate passes "**'unless the intention not to do so be clearly indicated,'**" and saying:

> "'Defendant says Baldwin's deed disclosed no intention to convey half of the highway. This is not the interpretative test. The test is whether the deed **expressed** intention to exclude half the highway from the grant'." (28 F. (2d) 162.)

In *Shell Petroleum Corporation et al v. Hollow* (10 C. C. A. Kan.), 70 Fed. (2d) 811, the court said:

> "The servient estate passes with such a conveyance, even though no express provision to that effect is contained in the instrument. The rule is that such estate passes unless it is excluded by **clear, unequivocal and unmistakable language.**" (p. 814.)

In *Roxana Petroleum Corporation v. Corn* (8 C. C. A. Kan.), 28 F. (2d) 168, the court in holding the attempted reservation of title to the railroad right of way was insufficient said:

> "'Did the exception in the oil and gas lease clearly indicate an intention to except therefrom the oil and gas in the tract of land in and across which Buffington had theretofore conveyed a right of way to the railroad company?" (p. 170.)

Texas decisions could be multiplied holding that the servient estate in roads, railway rights of way, etc., pass with a conveyance of the fee to the abutting tract of which the strip formerly was a part, unless there is an **express reservation** in the deed, some of which cases are *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448; *Bolton v. Dyck Oil Company*, 114 S. W. (2d) 299; *Weiss v. Goodhue*, 102 S. W. 793 (writ refused); *Gulf Sulphur Company v. Wyman*, 221 S. W. 310; *Gulf Production Co. v. Warren*, 99 S. W. (2d) 616 (writ refused); *Guadalupe County v. Poth*, 163 S. W. 1050; *Amerman v. M. K. & T. Ry. Co.*, 182 S. W. 54 (writ refused).

Since the road was entirely laid out on land belonging to the four Rogers heirs the title to the entire strip passed to J. F. Rogers. (9 *C. J.*, sec. 97, p. 203; 4 *R. C. L.*, sec. 8, p. 79; 2nd Ed. *Devlin on Deeds*, p. 312; *Gulf Sulphur Co. v. Wyman*, 221 S. W. 310, 312; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448, 450.)

The same principle is applicable to alleys and private ways (*Weiss et al v. Goodhue*, 102 S. W. 793

(writ refused); *Guadalupe County et al v. Poth et al*, 163 S. W. 1050; *Pecos & N. T. Ry. Co. et al v. Falls*, 96 S. W. (2d) 430; *Paine et al v. Consumers, Forwarding & Storage Co. et al* (6 C. C. A. Ohio), 71 Fed. 626; 58 A. L. R. 238; 9 *C. J.*, sec. 107, pg. 205), **and applies to partition deeds** (*Amerman et al v. M. K. & T. Ry. Co.*, 182 S. W. 54 (writ refused); *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S. W. (2d) 1080; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448), **and the oil and gas leases** (*Rio Bravo Oil Co. v. Weed, supra; Cantley v. Gulf Production Co., supra; Bolton v. Dyck Oil Co.*, 114 S. W. (2d) 299 (writ dismissed); *Gulf Production Co. v. Warren*, 99 S. W. (2d) 617 (writ refused); *Roxana Petroleum Corp. v. Sutter* (8 C. C. A. Kan.), 28 Fed. (2d) 159), and the owner of an oil and gas lease on such servient estate can maintain an action in trespass to try title or remove cloud. (*Gulf Sulphur Co. v. Wyman*, 221 S. W. 310.)

The intention of grantors as expressed in instruments in chain of title.

The court in arriving at the intention of the Rogers heirs should not only have considered the call for the Wiley Davis Northeast corner, but it should have given much weight to the well settled rule of property in Texas that there is a presumption that parties partitioning land intend to divide all of it, and not retain small narrow strips. (*Gulf Production Co. v. Baton*, 108 S. W. (2d) 960 (writ refused); *Beck v. Gulf*, 113 S. W. (2d) 258.) **Experi-**

ence has led the courts in Texas to resolve all presumptions against the retention of small strips and gores. (*Livingston Oil & Gas Co. v. Shasta Oil Company*, 114 S. W. (2d) 378 (writ dismissed).

Another fact evidencing the intention on the part of the Rogers heirs to partition all the land was the fact that the patent from the State of Texas called for the North line of the Thomason Survey to be only 1760 yards (1900.8 vrs., being one mile) (R. 96-97), and the deeds to the East one-half, including the one to Louisa Rogers, called for the North line thereof to be only 880 yards (950 vrs. being 880 yards) (R. 102-104) and the partition deeds to the North two tracts called for their combined distance to be 880 yards. These instruments being in the petitioner's chain of title showed that the parties had always treated the East one-half as being 880 yards wide, even though on the ground it was excessive because the patented survey included more land than the called distance under the rule in Texas that marked objects control distances.

As a matter of fact the heirs of J. F. Rogers in their lease to W. P. Chandler (petitioner's lease) expressly declared "*it being the intention to include all land owned or claimed by lessor in said surveys*" (R. 139).

Parol testimony of F. E. Rogers, if admissible, did not show intent to reserve title to road.

Based on the parol testimony of F. E. Rogers, admitted over petitioner's objection, the court held that e Rogers heirs intended to leave unpartitioned the ad and concluded that title remained at all times in em. Mr. Rogers testified that when the survey was ing made, after the surveyor had told the heirs ere was a chain left the heirs said "We will just ep that like it is. We were using that for a road at at time of the year." (R. 222.) This meant no more an they would let the 66 foot strip remain as a road. certainly was not sufficient to show a clear intent retaining title in themselves to the strip. (*Cantley, Gulf Production Company*, 118 S. W. (2d) 448; *eiss v. Goodhue*, 102 S. W. 793 (writ refused); *ell Petroleum v. Hollow* (10 C. C. A. Kan.), 70 F. d) 811; *Roxana Petroleum Corp. v. Sutter* (8 C. C. Kan.), 28 Fed. (2d) 159; *Roxana Petroleum Corp. Corn*, 28 F. (2d) 168.

In *Bolton v. Dyck Oil Company*, 114 S. W. (2d) 9 (writ dismissed), the court said:

"'A grant of land by metes and bounds with full covenants of warranty, excepting or reserving a roadway for the use of the public, or a right of way, for a railroad, passes the fee to the land subject to the easement reserved.' In Wellman v. Churchill, 92 Me. 193, 42 A. 352, it was held that the reservation or exception of 'a way' reserved only an easement, not the soil or fee. In Wellman v. Dickey, 78 Me. 29, 2 A. 133, a deed containing the words 'excepting the roads

laid out over said land' was held to convey the fee within the limits of the road, subject to the easement of the public incident to the use of the road. See, also, Roxana Petroleum Corp v. Corn, 8 Cir. 28 F. (2d) 168; Shell Petroleum Corp. v. Corn, 10 Cir. 54 F. (2d) 766, and Martin v. Southern Pine Lbr. Co., 284 S. W. 918. *-* *" (p. 301.)

Failure to mention road in conveyance does not militate against conclusive presumption.

The Circuit Court in holding that J. F. Rogers did not acquire title to the road under the partition deed, said: "Since the deed as prepared said nothing about a road as a boundary there was no occasion to make a reservation of the land." None of the many Texas cases cited above hold that a road remains with grantors if not called for in the deed, but on the other hand hold title passes if the called distance extends to the edge and the road is not expressly reserved in the deed.

In *Magnolia Petroleum Co. v. Caswell*, 295 S. W. 653, reversed on other grounds, 1 S. W. (2d) 597, the Court of Civil Appeals, quoting with approval the rule as announced in *Corpus Juris*, said:

"It is also said that failure to mention street or hightway does not prevent the above rules operating. It is thus said in 9 C. J. 199, sec. 89: 'The general rule that the grantee of land bounded by a street or highway takes to the center thereof is not affected by the fact that the land is not described in the deed as bounded on the highway, provided it is actually so bounded. The

presumption that it was not the intention of the grantor to withhold his interest in a street or highway to the middle of it, after having parted with all his right to the adjoining land, is just as strong as if the conveyance had expressly mentioned the street or the highway as a boundary." (295 S. W. 659.)

Many cases from other jurisdictions hold contrary to the rule announced by the Honorable Circuit Court of Appeals, some of which are as follows: 9 *C. J.* 199, sec. 89; 11 *C. J. S.* 581, sec. 35A; 7 *Tex. Jur.* 131, sec. 11; *Annotation* 2 *A. L. R.* 6, 31, sec. Vg; 47 A. L. R. 1276, Vg; *Annotation* 17 L. Ed. 818; *Thompson on Real Property*, sec. 3202, Note 60; *Magnolia Petroleum Co. v. Caswell* (Tex. Civ. App.), 295 S. W. 653, 659, reversed on other grounds, 1 S. W. (2d) 597; *Roxana Petroleum Co. v. Sutter*, 28 Fed. (2d) 159; *Merchant v. Grant*, 26 Cal. App. 584, 147 Pac. 484; *Florida Southern Ry. Co. v. Brown*, 23 Fla. 104, 1 So. 512; *Bowers v. Atkinson, T. & S. F. Ry. Co.*, 119 Kan. 202, 42 A. L. R. 228, 237 Pac. 913; *City of Springfield v. Eisenmeyer*, Mo. Ct. App. 297 S. W. 460; *Grant v. Moon*, 128 Mo. 43, 30 S. W. 328; *Van Winkle v. Van Winkle*, 184 N. Y. 193, 77 N. E. 33; *Cross v. Talbot*, 121 Ore. 270, 254 Pac. 827; *Durbin v. Roanoke Bldg. Co.*, 107 Va. 753, 60 S. E. 86; *Norcross v. Griffith*, 65 Wis. 599, 27 N. W. 606, 56 Amer. Rep. 42; *Wegge v. Madler*, 129 Wisc. 412, 109 N. W. 223, 116 Amer. St. Rep. 953.

The rule is well stated in *Cross v. Talbot*, 121 Ore. 270, 254 Pac. 827, wherein the court said:

> **"We are of the opinion, and we take it that the weight of authority is to the effect that, where the land described by metes and bounds actually abuts upon the highway, the grantee, in the absence of some clear intention on the part of the grantor to otherwise limit the description, will take to the center of the highway to the same extent that he would had the highway been actually mentioned as a boundary." (254 Pac. 828.)**

In *Van Winkle v. Van Winkle* (New York Appeals 1906), 77 N. E. 33, the court said:

> **"Where a deed gives the boundaries of the land conveyed by courses and distances, without mentioning a street by which the same is bounded on one side, but where it appears that the distance given does, in fact, carry the boundary to the street and along it, it is the same as though the boundary were described as running to the street and along the same, thus extending the title to the center." (77 N. E. pp. 35-36.)**

The Circuit Court of Appeals has cited no authority supporting its holding on this question. At the conclusion of the paragraph dealing with the road it cited 11 *C. J. S.* "*Boundaries*," sec. 35 (4). We have examined carefully this citation and we fail to find support in the court's opinion. On the other hand the text announces a contrary rule (11 *C. J. S.* "*Boundaries*," sec. 35A, page 581, citing among other cases *Cross v. Talbot*, quoted from above, stating that the general rule is the title passes even though "the land

is not described in the conveyance as bounded on the highway."

It is immaterial that the travel was not over the entire 66 feet.

Even though all of the 66 foot strip was not being used as a road at the time of the partition, it was set aside for road purposes for the benefit of the heirs and their grantees and therefore title passed. Defendants plead that at the time the partition was made the 66 foot strip was being used as a logging road and the heirs purposely left the strip unpartitioned so that at all times they would have an open outlet. (R. 34-35 ¶ 10-11.) F. E. Rogers, one of the heirs who accompanied the surveyor, testified they were using the 66 foot strip for a road at that time of the year, they having a sawmill on their land (R. 222). He testified:

"Since the division between the heirs and the establishment of the 440 yard corner at the North and the establishment at the corner where the gear wheel is located, **a road has been open for the use of anyone who wanted to travel it.** To my own knowledge, J. E. Rogers, Mrs. Waskom and Mrs. L. J. Rogers never claimed that road as against the children of Alexander Rogers. Up until the time the Empire filed this suit I had never known of anyone claiming this road as against us." (R. 223-224.) * * *

"I have lived all my life not very far from the tract. I knew it was cleared out. **I expect the road was fifty or sixty feet wide between Dink's**

West fence and Davis fence in the old days." (R. 227.)

The road was an ordinary country one, the travelling public having meandered back and forth between the trees in such a way as to avoid the washes caused from heavy rains (R. 244-246). When petitioner acquired its oil and gas leases the fences were at least 60 to 70 feet apart although the road did not take up all of this area.[1] The character of the road from the time of the partition until long after the discovery of the East Texas Oil Field was described by F. E. Rogers (R. 222-224, 226-227); in fact he testified that since the partition and establishment of the corner where the gear shaft was located **"the road has been opened for the use of anyone who wanted to travel it** (R. bottom 223, top 224), and that up until the time petitioner filed the suit he had never known of anyone claiming the road against the heirs (R. top 224).

The road was further described by witnesses (Simmons (R. 244-246)[2]; Sport (R. 239-241)[3]; York (R.

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[1]Bearing in mind the Texas rule announced in *Texas Bitulithic Co. v. Warwick*, 293 S. W. 180, **"that the purchaser of a lot should be put definitely upon notice that he has no rights in the sidewalk and street of his property, if that is the intention of the grantor,"** there was nothing in the partition deed to put petitioner on such notice, and the strip was being used for road when it acquired its lease. Applying equitable principles petitioner should not suffer for defendants' mistakes.

[2]**"The roads meander back and forth in between those trees and at the exact spot I do not know whether there is any road or not. The road would wash on one side and then they would get on the other side."** (R. 246.) **"The road is traveled one place one time and another place another time."** (R. 244.)

[3]**"The fences must have been at least sixty or seventy feet apart but**

195-196); Baker (R. 123, 125, 135)*; and Leuty (R. 152-153).

We do not contend that since 1899 each and every square foot of the 66 foot strip has been travelled over daily. Even though at times of the year the travel was confined to the furtherest edge of the road, does not mean the strip was not a road. As defined by Webster's New International Dictionary, a road is a place where one may ride and we believe a road includes the footpaths, drainage ditches and all other portions of the area set aside for public or private use.

The Texas rule is stated in 39 *Tex. Jur.* "*Streets*," sec. 6, page 515, as follows:

> "Nor is it essential that the public use the entire width of a dedicated street in order to preserve its rights to the same; and the fact that the street is not graded or worked or used for travel to its full width as dedicated does not affect the right of the public to use its entire width as dedicated or the effect or extent of the dedication and acceptance." (39 *Tex. Jur.*, p. 515, sec. 6.)

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the road did not take up all the land, however. The road was cut out twenty-five, thirty or forty feet wide. It did not go plumb straight when it was originally cut out. Davis' fence was back ten, fifteen or twenty feet from the West line of the road. * * * Wiley Davis had a fence on the West side of the road running clear up to the school house lot. I do not think, in 1930, before the road was widened, Davis and Rogers' fences were within forty-five feet of each other. I did not measure them. I was road overseer and people went over the road. In my judgment they were sixty or seventy feet apart. After the fences were put there the road was widneed." (R. 239-240.) * * * "It was almost in the road. The road wobbled quite a little bit." (R. 241.)

*"When I was there the road was about 60 feet wide and it was a well graveled and muchly traveled road at that time." (R. 123.)

In *Bruner Fire Co. v. Payne*, 118 S. W. 602, the Texas Court of Civil Appeals said:

> **"The effect of appellant's contention is that, to preserve its rights to a highway, the public must use for purposes of travel every foot of it. This is not the law."** (p. 605.)

The Texas courts have said that the title passes, it being immaterial that the road was never opened or that it was abandoned. (*Amerman v. M. K. & T. Ry. Co.*, 182 S. W. 54; *Texas Pacific Railway Co. v. Chandler*, 20 S. W. (2d) 380; *Cantley v. Gulf Production Co.*, 118 S. W. (2d) 448, 450; *Temple v. Sanborn*, 91 S. W. 1095.

In *Emerson v. Bedford*, 51 S. W. 889 (writ refused), the court said:

> **"It seems, however, that these streets were never opened and used or otherwise accepted by the public; but that did not affect the rights of the subsequent grantees of the blocks, taking conveyances with reference to the streets."** (p. 890.)

In *Loud v. Brooks*, 241 Mich. 452, 217 N. W. 34, the court reviewed numerous cases where the facts showed the road had not been opened or abandoned and stated that their research had discovered only two cases holding title did not pass if the road was not opened, one being a New Jersey case and the other a Maine case. It cited many cases holding the contrary rule and held that the better rule was that a conveyance of land bounded by a highway, street or

alley, carried with it the fee to the center thereof, subject to the easement, provided there were no words in the deed showing a contrary intent whether the dedication of the highway, street or alley had been accepted or not or had been opened or not.

In *Paine v. Consumers Forwarding & Storage Co.* (6 C. C. A. Ohio), 71 Fed. 626, Justice Taft said:

> "First, it is said that the principle is never applied except when there is an actual public highway forming a visible monument. The case of Hopkinson v. McKnight, 31 N. J. Law 427, is relied upon to sustain this proposition. The weight of authority is, however, decidedly to the contrary. In the case of Stark and Wales v. Coffin, 105 Mass. 328, it was held that a deed conveying part of a tract of land as bounded 'by a passageway of fifteen feet wide,' leading across the tract, with no restriction or controlling words, passes the fee to the center of the way so assumed as a monument, although no such way existed at the date of the deed, or has ever been fenced off, and although the deed provided that the passageway was to be held in common forever by the parties to the deed." (p. 630.)

Parol evidence in derogation of partition deed was inadmissible.

The trial court erred in concluding as a matter of law extrinsic evidence was admissible to show the surveyor stopped at 440 yards West of the Northeast corner of Tract No. 2 and set a stake, leaving the strip out of the partition for a road (R. 70-71). In the absence of an express reservation title to the road

passed to J. F. Rogers, his heirs and their lessees and assigns, and parol evidence was not admissible to show the parties intended otherwise (*Rio Bravo Oil Co. v. J. F. Weed, et al*, 121 Tex. 427, 50 S. W. (2d) 1080, cer. den. 288 U. S. 603; *Gulf Production Co. v. Warren*, 99 S. W. (2d) 616, writ refused).

In *Gulf v. Warren, supra*, the controversy involved the inclusion or non-inclusion of a railroad right of way in the description of an oil and gas lease, which was bounded by the right of way, and the lessors sought to show they went upon the ground and specifically pointed out the tracts to be covered by the lease, which designation did not include the railroad right of way. The court held that such testimony was not admissible and if received was without probative force in the construction of the lease (99 S. W. (2d) 626) and cited and relied upon *Rio Bravo Oil Company v. Weed*, supra, by the Supreme Court of Texas.

Rules of evidence in suits in Federal courts involving Texas land are controlled by Texas decisions (*Olcott v. Bynum*, 17 Wall. 44).

The trial court found that the stakes testified about by F. E. Rogers, as well as the old gear shaft, were not mentioned in any of the instruments in petitioner's chain of title (R. 68 ¶ 16). Petitioner should not be bound by the location of objects not called for in its chain of title, particularly when the location of these objects are in direct conflict and repugnant to the call for an adjoinder, i. e. Wiley Davis Northeast corner. The court so held in *Anderson v. Stamps*, 19

Tex. 460, saying "That would be to contradict by parol the most material call of his grant."

Federal Courts follow state courts on construction of deed, and rules of evidence.

In construing the partition deed to J. F. Rogers and the oil and gas lease held by petitioner on questions concerning the amount and location of the land conveyed, the Federal Court should have followed the decisions of the Texas Supreme Court (*Kuhn v. Fairmont Coal Co.*, 215 U. S. 349; *Massachusetts v. New York*, 271 U. S. 65). **Likewise it should have followed the decision of the state court on questions involving the admissibility of evidence** (*Olcott v. Bynum*, 17 Wall. 44), **because the Texas decisions constitute rules of property** (*Edward Hines Yellow Pine Trustees v. Martin*, 268 U. S. 458). **The fact this is an equitable action does not militate against the rule** (*Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202; *Mason v. U. S.*, 260 U. S. 545).

SECOND POINT

The court erred in holding Erie Railroad Company v. Tompkins and cases following it did not require a Federal equity court in passing on Texas land titles to follow decisions of the Supreme Court of the state holding that the ownership of the legal title is attended with presumptions of innocence, good faith and value paid, and the burden is on the holder of the equitable title to both plead and prove the holder of the legal title was a mala fide purchaser, and in as-

signing as a reason for refusing to follow the Texas decisions that they were matters of practice or procedure, and the rights accruing to the legal title holder were not created by statute but by court decisions.

Defendants realizing that the call for the Wiley Davis corner would include the road, plead it was inserted through mistake (R. 31) and the trial court reformed the partition deed and oil and gas lease held by petitioner by deleting the Davis adjoining call (R. 52-56). Defendants did not plead and prove petitioner had notice of such mistake, that it did not purchase from a bona fide purchaser, and that it did not pay a valuable consideration.

As we understand the court's opinion, it entertained no doubt but that the adjoining call vested petitioner with the legal title to the strip; however, it thought and held defendants were entitled to a reformation of the partition deed and oil and gas lease on account of their mistake and the failure of petitioner to plead and prove it was a bona fide purchaser of the legal title.

The Honorable Circuit Court thought that under such decisions as *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69; *Swann v. Mills*, 219 S. W. 850 (writ dismissed), and *Miller v. Southland Insurance Company*, 68 S. W. (2d) 558, cited in our brief, petitioner held the legal title to the strip.

In *Swann v. Mills, supra,* the deed called for adjoinders but the surveyor stopped at the called distances, short of the adjoinders and marked a line not called for in the deed, and the court held legal title of the land to the adjoinder passed, saying:

> **"Whether Ingraham intended to do so or not, he executed a deed which conveyed to the true west boundary line of the Neil survey and thereby invested his grantee with the legal title to all he described. Whatever interest remained in him by reason of a mistake in thus describing the land was an equity, of which there was no written record. One purchasing from Ingraham's grantee without notice of that equity would acquire title to all the land described in the deed." (p. 852.)**

One of the earliest cases of Texas announcing the rule that the legal title of a strip passed on account of the adjoining call is *Garrison v. Crowell,* 67 Tex. 626, 4 S. W. 69, in which case the deeds in the chain of title called for an adjoinder but the surveyor stopped at the called distance, which was 79 varas short of the adjoinder and hacked a line at the called distance (however, the deeds did not call for the hacked line just as the partition deed in the case at bar did not call for the stakes and gear wheel); the original grantor sought to recover the 79 vara strip against a subsequent grantee who bought on the strength of the call for adjoinder, and he was denied any relief because he failed to show the subsequent grantee knew of the mistaken call for the adjoinder.

In *Miller v. Southland Insurance Company,* 68 S.

W. (2d) 558, following and citing *Garrison v. Crowell*, a recovery was denied those asserting an equitable title against the bona fide purchaser of the legal title where their claims were based on their testimony that the calls for the adjoinder were inserted through mistake and the surveyor stopped at the called distance and set objects not called for in the deed.

Texas rule of presumptions attended with purchase of legal title.

On motion for rehearing the Circuit Court stated that although the Texas rule was exceptional and the minority, nevertheless the decisions of the Texas Courts were well settled that on an issue of bona fide purchaser for value without notice, the burden of proof is upon him who attacks the legal title and asserts the equity, citing *White v. Hicks*, 104 S. W. (2d) 136.

In *R. B. Godley Lumber Co. v. Teagarden*, 135 S. W. 1109 (aff. *Teagarden v. R. B. Godley Lbr. Co.*, 105 Tex. 616, 154 S. W. 973), it was said;

> "* * * It is clear that, as against an equity or equitable estate, the holder of the legal title is presumed to be a holder in good faith. The well-established rule is that one who seeks to establish an equity or equitable interest as against the holder of the legal title has the burden of proving notice of his equity to the holder of the legal title at the time of his purchase." (135 S. W. 1114.)

In the Supreme Court the same rule was said in this language:

> "The right of the plaintiff Teagarden in the land is an equity. The Godley Lumber Company has the legal title. The rule is that under this state of facts the burden was upon plaintiff to show notice to the Godley Lumber Company." (105 Tex. 620.)

Texas cases can be multiplied announcing the same rule, some of which are: *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909; *Love v. Allday*, 106 S. W. (2d) 830, writ dismissed; *Kenedy v. State*, 196 S. W. 287, affirmed 111 Tex. 200, 231 S. W. 683, cer. den. 258 U. S. 617; *Davidson v. Renfro*, 114 S. W. 449.

Thus, in Texas, if the plaintiff as the legal title holder, sues the defendant as the equitable title holder, plaintiff is entitled to a judgment on the pleadings or, at the conclusion of the evidence, unless defendants have not only plead and proved their equitable title but have also plead and proved plaintiff was not a bona fide purchaser. (*Catrett v. Brown Hardware Co.*, 86 S. W. 1045; *Brown Hardware Co. v. Catrett*, 101 S. W. 559, writ dismissed; *Middleton v. Johnson*, 110 S. W. 789; *Ratcliffe v. Mahres*, 122 S. W. (2d) 718.)

In *Brown Hardware Co. v. Catrett*, supra, the court said:

> **"Plaintiff having purchased the legal title, the burden was upon defendants to show that it purchased with notice of their equity, or that it did not pay value for the property. McAlpine v.**

Burnett, 23 Tex. 650; Lewis v. Cole, 60 Tex. 341; Turner v. Cochran, 61 S. W. 923, 94 Tex. 480." (101 S. W. 560.)

It therefore matters not whether the suit is brought by the legal title holder or the equitable title holder, under Texas law the burden in all events is on the equitable title holder to overcome the presumptions attended with the purchase of the legal title.

Applicability of Erie Railroad Co. v. Tompkins, and Central Vermont Ry. Co. v. White, 238 U. S. 507.

In a Texas court petitioner would have been entitled to a judgment on the pleadings, inasmuch as defendants sought to reform their deed executed in 1899 on account of their mistake and did not plead petitioner was a mala fide purchaser; i. e., they failed to plead a defense to petitioner's cause of action. The necessity of a plea that the legal title holder is a mala fide purchaser, being made an essential part of the equitable title holder's cause of action or defense by the substantive law of Texas, it must be recognized and followed by Federal Courts.

Somewhat similar in principle to the Texas rule is the minority rule applied in some states that plaintiff must plead and prove freedom from contributory negligence, and this court has held the state court decisions create substantive rights, and therefore are not rules of procedure. It was said in *Central Vermont Railway Company v. White*, 238 U. S. 507:

"But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further, and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those states the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff to establish all of the facts necessary to make out his cause of action. But the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in states which hold that the burden is on the plaintiff. Washington & G. R. Co. v. Gladmon, 15 Wall 401(1), 407, 408, 21 L. Ed. 114-116; Hough v. Texas & P. R. Co., 100 U. S. 225, 25 L. Ed. 617; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551 (4) 557, 35 L. Ed. 270, 272, 11 Sup. Ct. Rep. 653; Washington & G. R. Co. v. Harmon (Washington & G. R. Co. v. Tobriner), 147 U. S. 581, 37 L. Ed. 288, 13 Sup. Ct. Rep. 557; Hemingway v. Illinois C. R. Co., 52 C. C. A. 477, 114 Fed. 843." (238 U. S. p. 512.)

The principles enunciated by the Supreme Court in its language quoted in the preceding paragraph have

been approved by the court in the following case: *New Orleans & Northeastern R. Co. v. Harris*, 247 U. S. 367, at page 372; *Hill v. Smith*, 260 U. S. 592, at page 594; *Herron v. Southern Pac. R. Co.*, 283 U. S. 91, at page 93; and *Miller v. Union Pac. R. Co.*, 290 U. S. 227.

The fact that this Court under the doctrine of *Swift v. Tyson*, 16 Pet. 1, which dealt with substantive law, has uniformly held that the law governing the burden of proof in cases involving contributory negligence lay in the field of general law in which the Federal Courts were not bound by state law, seems to establish the view of this Court against the holding of the Honorable Circuit Court of Appeals that the Texas decisions do not create substantive law but are only matters of practice or procedure.

Therefore, since the Texas decisions announced the substantive law of the state, they should have been followed by the trial court and the Circuit Court of Appeals. (*Erie Railway Company v. Tompkins*, supra, and *Ruhlin v. New York Life Ins. Co.*, supra.)

The Circuit Court intimated that a holding that the Texas rule was a matter of substantive law would conflict with the "New Rules of Federal Practice" (promulgated subsequently to trial of case at bar). We do not believe the rules of Federal practice were intended to destroy substantive rights attended with the purchase of legal title to real property for, if they were so interpreted, they would be "unauthorized and void" because the enabling act

under which the rules were promulgated forbade interference with "the substanve rights of any litigant." (Act June 19, 1934, sec. 1, 28 *U. S. C. A.*, sec. 723b.) We believe Professor Cook, in his article *"Substance and Procedure in Conflict of Laws"* (1933, 42 *Yale Law Journal* 333) came to the correct conclusion in stating that in order to prevent a plaintiff from choosing the state he will bring his action with a view to benefits by so-called "procedural" advantages not accorded by the *lex loci*, rules of presumption, burden of proof and analogous rules which may materially affect the outcome of litigation, should be treated as substantive. The underlying policy of the *Erie* case may be thwarted as easily in cases in which failure to apply a state rule of presumption attended with the purchase of legal title seems likely to lead to a result different from those which would be obtained by an application of the rules, as by failure to apply those state rules which are traditionally called substantive.

Strictly speaking the rules of evidence are considered matters of practice and procedure, but where rules of evidence go to the substantive rights of the parties, such as the admissibility of testimony in cases involving title to land, the Federal Courts follow the state decisions. *Olcott v. Bynum*, 17 Wall 44; *Turner v. California Co.* (5 C. C. A. Tex.), 54 F. (2d) 552; *O'Donnell v. U. S.* (9 C. C. A. Cal.), 91 F. (2d) 14, 22; reversed other grounds 303 U. S. 501.

The Honorable Circuit Court laid great emphasis

on the fact that the presumptions attended with the purchase of a legal title were not created by state statutes but by decisions of the Supreme Court, and said:

> "We have here not a case where a Texas statute has created the right asserted, or has created a presumption, or is in any manner to be applied as construed in Texas. The question is simply what is the proper practice in courts of equity. The practice followed in the state courts of Texas, where equity courts as such do not exist, is not controlling."

This court said in *Erie Railroad Co. v. Tompkins*, supra:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of a state shall be declared by its Legislature in a statute or by its highest court in a decision, is not a matter of Federal concern." (304 U. S. 78.)

Again in *Ruhlin v. New York Life Insurance Co.*, supra, the court said:

> "The subject is bound to be governed, even in the absence of state statutes, by the decisions of the appropriate state courts. The doctrine applies though the question of construction arises not in an action at law, but in a suit in equity." (304 U. S. 205.)
>
> "The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the

state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state court, and just as they would in a case tried in a state court, and just as they have always done in actions brought in the federal courts involving what were known as matters of 'local' law." (304 U. S. 209.)

THIRD POINT

The court erred in holding there was no showing of consideration paid for the oil and gas lease, for it is well settled in Texas that an instrument reciting $1.00 paid with obligations expressed or implied to drill offset wells, sufficiently shows on its face a consideration. Such is not only the rule in Texas but it is the majority rule and the one applied by the Federal Courts.

The partition deed to J. F. Rogers recited a consideration of $50.00 in hand paid (R. 105), while the lease in question recites a consideration of $10.00 paid, the royalties provided therein and also contained an unequivocal agreement to offset a well or wells producing oil or gas in paying quantities within 150 feet or in draining the leased premises (R. 139, 142). The assignment of the oil and gas lease from W. P. Chandler to petitioner's predecessor recites a consideration of $1.00 paid and other good and valuable considerations.

Jones v. Bevier, 59 S. W. (2d) 945 (writ denied), and *Bailey v. Shell Petroleum Corporation*, 95 S. W. (2d) 982 (writ denied), hold that a recitation of $1.00 paid and the obligation to drill offset wells was, under Texas decisions, a sufficient showing of consideration.

The recitation of $10.00 paid in the Chandler lease (R. 139) was sufficient evidence of payment of a valuable consideration to support the lease and the defense of innocent purchaser, such being the express holding in the Texas cases of *Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ denied (citing *Kelly v. Jackson*, 6 Pet. 622, 632); *Russell v. Beckert*, 195 S. W. 607; *Luna v. Johnston*, 11 S. W. (2d) 350; *Robertson v. Hefley*, 118 S. W. 1159; *City of San Saba v. Hudson*, 95 S. W. (2d) 1312, as well as by the cases of *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982, and *Jones v. Bevier*, 59 S. W. (2d) 945, above cited, in both of which writs of error were denied.

It is also settled in Texas that $1.00 paid is sufficient consideration for an oil and gas lease. This is held in the following cases: *Emde v. Johnson*, 214 S. W. 575, writ denied; *Hitson v. Gilman*, 220 S. W. 140; *McKay v. Tally*, 220 S. W. 167; *McKay v. Lucas*, 220 S. W. 172; *McKay v. Kilcrease*, 220 S. W. 177; *Johnson v. Russell*, 220 S. W. 352, writ denied; *Lone Star Gas Co. v. McCullough*, 220 S. W. 1114; *Leath v. Humble Oil & Refining Co.*, 223 S. W. 1022; *Jones v. Bevier*, 59 S. W. (2d) 945, writ denied; *Bailey v. Shell Petroleum Corp.*, 95 S. W. (2d) 982,

writ denied. These cases are founded on the Supreme Court case of *Quebe v. Gulf, C. & S. F. R. R. Co.*, 98 Tex. 6, 81, S. W. 20, 66 L. R. A. 734, I Ann. Case. 545, where the Supreme Court of Texas held that a recital of $1.00 paid was sufficient consideration for the release of damages for personal injuries. Indeed, this is the rule obtaining generally (18 *C. J.*, p. 166, sec. 47) except in Louisiana (*George v. Manhattan Land & Fruit Co.* (5 C. C. A.), 51 F. (2d) 28), and numerous cases could be cited to support such rule. See, also, *Corsicana Petroleum Co. v. Owens*, 110 Tex. 568, 222 S. W. 154, where a recited consideration of $28.20 was held sufficient to support a lease, which provided that the lease might be surrendered by the payment of $5.00 and all other amounts due at the time of the surrender, the court adverting to the fact that the consideration was satisfactory to the grantors themselves and there could be no reason for the court striking down that part of it.

It is also the rule, supported both by Federal and State authorities, that the written receipt of the consideration is at least prima facie evidence of the payment thereof, and sufficient to require the person attacking the deed or other instrument to prove otherwise; in other words, such acknowledgment is sufficient to discharge the burden of proof in the absence of countervailing testimony. *New York Life Ins. Co. v. Seifris* (C. C. A. Pa.), 46 F. (2d) 391; *Heiskell v. Curtis* (App. D. C.), 259 F. 987; *DeArnaud v. U. S.*, 151 U. S. 483; *Russell v. Beckert*, 195

S. W. 607; *Moss-Tate Inv. Co. v. Owens*, 22 S. W. (2d) 1096, writ denied; *Luna v. Johnston*, 11 S. W. (2d) 350; *Haze v. Home Friendly Ins. Co.* (Md.), 197 A. 632; *City of San Saba v. Hudson*, 95 S. W. (2d) 1312; *Stowe v. Belfast Savings Bank*, 92 F. 90, aff. 92 F. 100; *Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B 360 and note. In the last case it was said:

> "* * * In the lease before us we find a valuable consideration paid, as it recites the payment of one dollar down. * * * Look back at hundreds of deeds through hundreds of years and you will find them stating one dollar as a valuable consideration. To say that such a consideration acknowledged under seal is not good would be to overthrow myriads of deeds. The parties have chosen to treat it as a sufficient consideration; they have contracted that it shall be such; and no court, in the absence of fraud, can nullify their contract." (Ann. Cas. 1912B, p. 361.)

In *New York Life Ins. Co. v. Seifris* (3 C. C. A. Pa.), 46 F. (2d) 391, the court said:

> "* * * Something more is required when a party takes the stand to contradict what he has previously, and deliberately, said under his own hand or, as here, under its own seal. A receipt is a writen acknowledgment of payment and therefore evidence of payment. Moreover, it is evidence of a high order because it is the creditor's admission against interest that the debtor has paid his debt." (p. 392.)

In the Texas case of *Luna v. Johnston*, 11 S. W. (2d) 350, the rule is thus stated:

> "The deed which conveyed the property in question to appellee was executed five years after he and his wife were married, and recited a cash payment of $500. A recitation of payment in a deed is prima facie evidence that the amount named therein was actually paid, and the burden is upon the person attacking same to show a different consideration. Russell v. Beckert (Tex. Civ. App.), 195 S. W. 607; Robertson v. Hefley, 55 Tex. Civ. App. 368, 118 S. W. 1159; Whitlock v. Barham & Duncan, 172 Ark. 198, 288 S. W. 4." (p. 351.)

In *City of San Saba v. Hudson*, 95 S. W. (2d) 1312, appellee sued in trespass to try title to recover certain property in the town of San Saba and the city sought by cross action to recover damages on the general warranty of title contained in its deed. The sole question was whether or not there was in fact any consideration for the deed, and the court said:

> "The recited consideration of $2,000 in the deed is sufficient in law, and the burden was upon appellants, particularly the interveners who were liable on their warranty of title to the city of San Saba, to show that there was in fact no consideration for the deed." (p. 1313.)

The rule is thus stated in *Corpus Juris* (66 *C. J.*, p. 1129, sec. 964):

> "But purchasers from a grantee are entitled to accept as true express recitals of the deed to

their grantor as to the consideration." (66 *C. J.* 1129.)

We think under *Erie Railroad Co. v. Tompkins*, supra, and *Central Vermont Railway Co. v. White*, supra, the court should have followed the Texas rule established by decisions of the Supreme Court of the state.

FOURTH POINT

The Honorable Circuit Court of Appeals erred in affirming a judgment which in effect granted a reformation of a deed executed in 1899, recorded in 1900, and an oil and gas lease executed and recorded more than four years prior to the filing of the suit, by eliminating from the description of the property conveyed the call for the Wiley Davis Northeast corner, which would have included the land in controversy, the pleadings and evidence wholly failing to excuse or explain the delay, such relief being accorded to the holder of the equitable title or an equitable right as against the holder of the legal title, for the reason that the asserted cause of action was barred by the statutes of limitation of Texas and equitable laches.

The partition deed to J. F. Rogers was dated February 28, 1899, and recorded February 10, 1900 (R. 205). The oil and gas lease to W. P. Chandler was dated October 20, 1930, and recorded November 18, 1930. The original petition was filed December 18,

1934 (R. 13), and the answer and cross action of defendants alleging a mistake in the call for the Wiley Davis Northeast corner (R. 34) was filed January 27, 1936 (R. 43).

The court found that the call for the Wiley Davis Northeast corner in the partition deed to J. F. Rogers was inserted by mistake (R. 68 ¶ 16).

Under *Swann v. Mills*, supra, and *Garrison v. Crowell*, supra, it is very plain that the legal title to the property involved in this suit vested in J. F. Rogers and through him in petitioner. Such deed must necessarily have been given that effect unless reformed, and the judgment below, in decreeing to defendants the tract of land in controversy, had the effect of reforming the deed. The Rogers heirs were charged with notice of the mistake they had made by virtue of the record of their deed. (*J. R. Watkins Co. v. Gibbs*, 66 S. W. (2d) 355; *Central National Bank v. Barclay*, 254 S. W. 140; *Vodrie v. Tynan*, 57 S. W. 680; *Martinez v. Guiterrez's Heirs*, 172 S. W. 766, writ den.; *Calhoun v. Burton*, 64 Tex. 510; *Boren v. Boren*, 85 S. W. 48, writ den.; *Ryman v. Petruka*, 166 S. W. 711; *Lant v. Manley*, 71 F. 7; *Teall v. Schroder*, 158 U. S. 172.)

Defendant's cause of action was barred by the statutes of limitation of Texas because it was not brought within four years after the alleged cause of action accrued (Article 5529, 16 *Vern. Rev. Civ. Stat.* 1925).

The doctrine of laches, if nothing else, would bar such right. (*Connelly v. Hammond*, 51 Tex. 635;

Empire Gas & Fuel Co. v. Higgins Oil & Fuel Co. (5 C. C. A.), 279 Fed. 977.)

CONCLUSION

Many witnesses who lived in the neighborhood of the Rogers family testified they had never heard of the three Rogers brothers claiming to own an interest in a strip along the West side of the tract partitioned to J. F. Rogers (R. 224, 275, 190).

The field notes in the handwriting of surveyor J. H. Simmons to Tract No. 1 partitioned to W. H. Rogers and Tract No. 3 partitioned to J. W. and F. E. Rogers were introduced in evidence (R. 264-274), photostatic copies being contained in the record (R. 269-274). They actually represent the work done on the ground by Mr. Simmons, and show that he ran through the center of the East one-half, going from East to West all the way to the Bozeman land, his footsteps being reflected by the call "thence West 440 yards to corner 4 to Bozeman land, pine 65° W 6 L. and pine S. 80° E. 14 L." (R. bottom page 266, top page 267, Exhibit 46; photostat original field notes R. 271). B. M. Bozeman formerly owned the West one-half of the Thomason Survey (R. 294), his East line being conterminous with the Rogers West line. Mr. Simmons had previously surveyed the Bozeman land in making their partition and knew the location of the East line of the West one-half of the Thomason survey owned by Mr. Bozeman (R. 192-193). His field notes pre-

pared while making the Rogers partition conclusively show that he ran a line through the center of the Rogers land to the Bozeman land. He therefore had to go 66 feet West of the gear shaft to reach the Bozeman land. Defendants did not deny the fact that the Bozeman line was 66 feet West of the gear shaft. Refuting F. E. Rogers' testimony is the salient fact the field notes are silent about the survey stopping 66 feet short of the Bozeman land (which lay South of the Wiley Davis land in a continuation of the Davis' East line).

We called this to the attention of the Honorable Circuit Court of Appeals as shown that the field notes in the handwriting of the surveyor contradicted the testimony of F. E. Rogers which was in substance that the surveyor stopped 66 feet short of the Wiley Davis Northeast corner and set a stake and then went South and set another stake subsequently replaced by the gear shaft. However the court stated that since petitioner had not been able to find and introduce the field notes of the tract partitioned to J. F. Rogers, there was nothing in the field notes introduced contradicting Mr. Rogers' testimony. The only way (which was the best way) petitioner had of contradicting Rogers' testimony was through the statements made in the field notes because he was the only person living who accompanied the surveyor at the time of the survey.

The instruments filed of record in the county where

the land was situated called for the Wiley Davis Northeast corner and there was nothing on record to place petitioner on notice that the surveyor set stakes short of the adjoinder since they were not mentioned in any instrument in its chain of title. The physical facts did not charge petitioner with notice defendants were claiming the strip because they were not in possession, but the public was, inasmuch as the strip was being used for a road. It has been the established public policy of Texas to require transfers of land by written instruments, for the state has experienced the uncertainties and confusions in land titles resting in parol. The case at bar is very illustrative of the injustices encountered in varying written instruments by parol testimony, for Mr. Rogers' testimony as received and applied by the court not only contradicted the material calls in the deeds in petitioner's chain of title, but conflicted with the field notes in the handwriting of the surveyor showing he went to the Bozeman land.

Texas courts, in order that its citizens can rely on recorded written evidence of title, have made a rule of law that there is a presumption attended with the purchase of a legal title of innocence, good faith and value paid. While not foreclosing the right of a holder of the equitable title to assert his claims, the courts have placed upon him the burden of overcoming the presumptions following the legal title. It is only fair and reasonable that the equitable title holder assume these burdens if the courts of the state are to carry out

the established policy that land titles are not to rest in parol.

The Texas rule therefore is not limited to the reception of evidence and matters concerning the trial of a case but it goes to the fundamentals of a cause of action or defense.

A substantive right having been created by the Texas courts for the protection of the legal title holder, such right should have been recognized in the Federal Court if *Erie Railroad Company v. Tompkins* is to have the effect intended by this Honorable Court, for otherwise an equitable title holder might prevail in a Federal Court while he would not be able to do so in a state court.

The Honorable Circuit Court failed to follow the Texas decisions in construing the partition deed when it held that after rejecting the call for the Wiley Davis Northeast corner, title to the strip did not pass to J. F. Rogers and petitioner because all of the 66 feet was not being used for a road, and no mention was made in such deed of a road. The court has placed a limitation on the Texas decisions that does not exist, this state having always held that title to a road passes unless it is expressly reserved in the deed, it being immaterial that the road was not being used or was not mentioned in the conveyance.

WHEREFORE, it is respectfully prayed that upon hearing of this cause, the judgment below be reversed and judgment rendered for petitioner for the land involved, together with such other relief to which it may be entitled.

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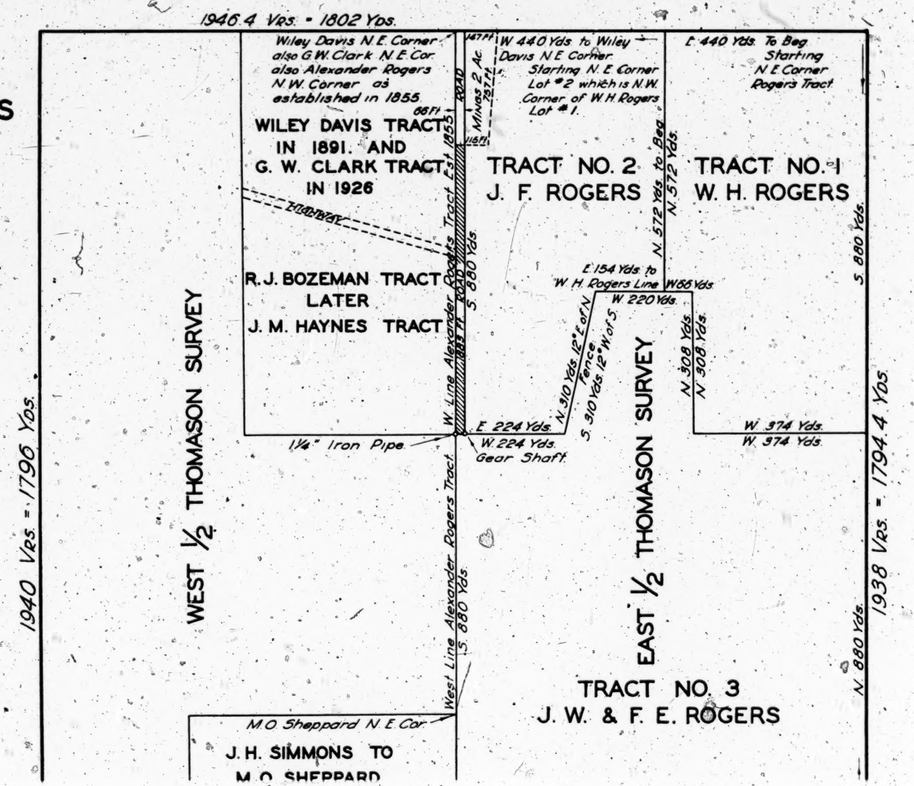
MAP DRAWN FROM TRIAL COURTS' FINDINGS OF FACT AND CONCLUSIONS OF LAW.

SCALE 1 IN.= 200 YDS.



OF FACT AND CONCLUSIONS OF LAW.

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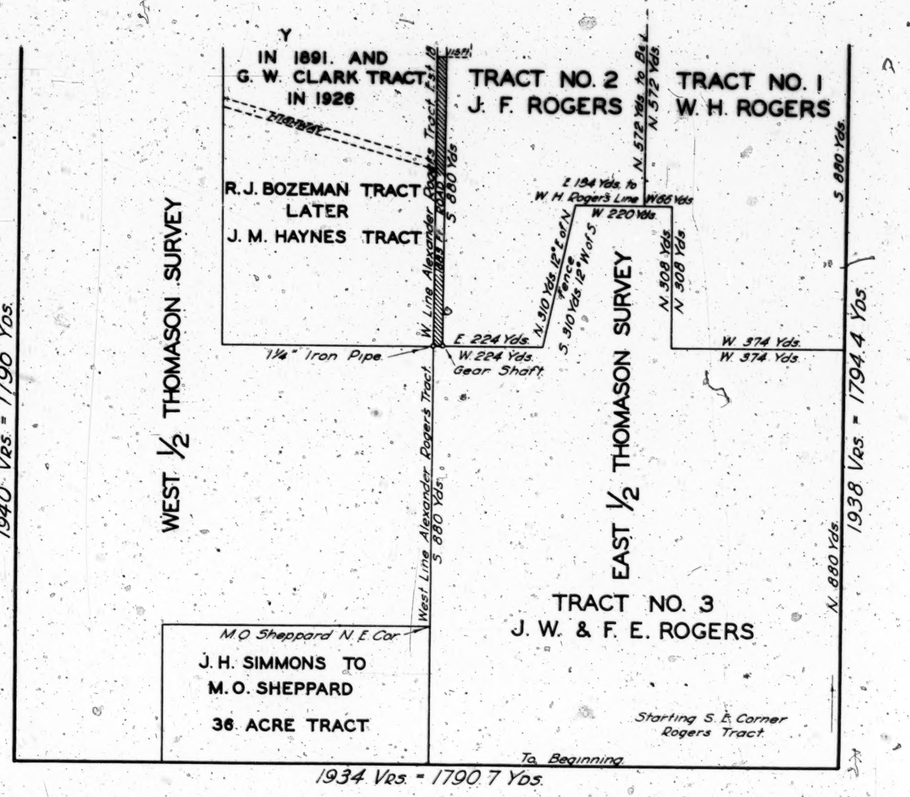

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 28

CITIES SERVICE OIL COMPANY, *Petitioner*

vs.

B. P. DUNLAP, ET AL

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

---

Reply Brief of Petitioner

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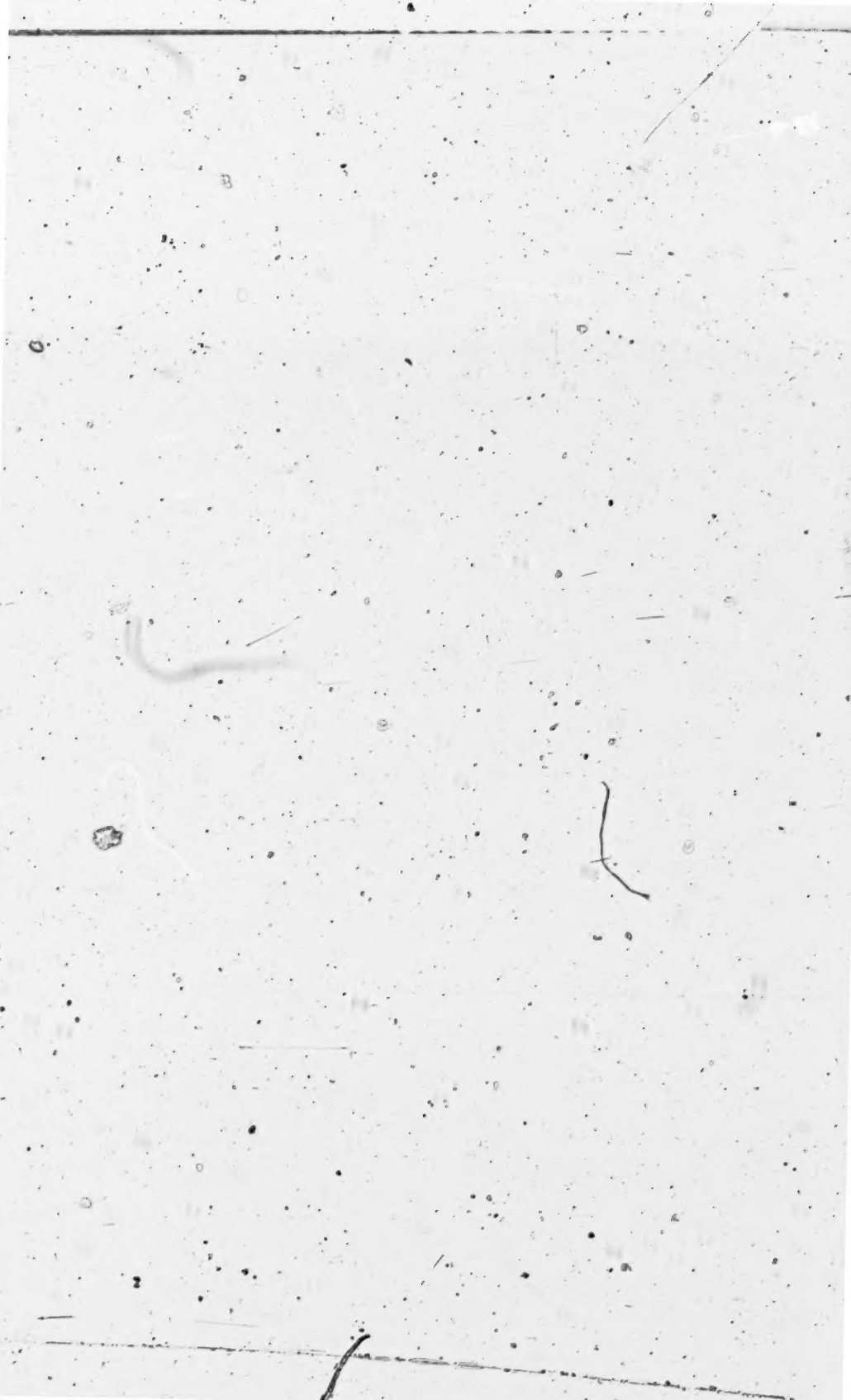

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Reply Brief of Petitioner

Respondents are in an anomalous position before this court by asking the affirmance of a decision of the Circuit Court of Appeals, but in so doing urging this court to reject the essential and controlling reasons assigned by the Circuit Court in its opinion rendering a decision favorable to them.

More than fifty pages of their brief are devoted to a fallacious argument that it was unnecessary and improper for the Circuit Court of Appeals to decide upon whom rested the burden of proving petitioner was an innocent purchaser *vel non*, although respondents urge that the Circuit Court correctly held they were entitled to introduce parol testimony to establish their mistake in inserting in the partition deed

of 1899 a call for the Wiley Davis Northeast corner which, if not inserted mistakenly, divested them of all their title to the land in controversy, and invested title to the oil and gas leasehold estate in petitioner.

It is now apparent to respondents that the Circuit Court of Appeals erred in holding that they were entitled to a reformation and correction of the partition deed, which had been of record more than thirty years at the time petitioner acquired its title to the oil and gas leasehold estate, and in assigning as a reason therefor that petitioner had not discharged the burden of proving it was an innocent purchaser of the land in controversy, and in holding on rehearing that the Federal Court need not follow the Texas rule placing on one claiming an equitable title arising out of a mistake in executing an instrument, the burden of pleading and proving the holder of the legal title was a mala fide purchaser, and in assigning as a reason therefor that the Texas decisions create rules of practice or procedure and not matters of substantive law. Being in this dilemna respondents urge this court to strike down as *dicta* everything the Circuit Court of Appeals said about the burden of proof being on petitioner to establish it was an innocent purchaser of the property in controversy.

As stated by the Circuit Court, respondents "by cross bill set up that a call in the deed to J. F. Rogers 'for the Wiley Davis Northeast corner' as the Northwest corner of the J. F. Rogers tract was inserted by the draftsman through inadvertence and mistake."

Respondents plead:

> "And if the deed in fact now calls for the Wiley Davis corner, the same is called for **by mistake,** and the surveyor actually on the ground did not run the line to such corner, **if the said corner was other than at 880 yards West of the Northwest corner of the Thomason Survey."** (R. 31.) * * *
>
> "That the deed was not then immediately prepared, **but when prepared if the call for Wiley Davis corner is in the deed same was put in by inadvertence and mistake,** and the line as actually surveyed on the ground did not go to the Wiley Davis corner, if said corner was or is any other place than 440 yards West of said Northwest corner of Block No. 1" (R. 34).
>
> * * * *
>
> "being established at a point 68 feet East of the line claimed by plaintiff in plaintiff's amended bill of complaint, **this being left out by the surveyor at the request of the Rogers family for a road, to be jointly owned and controlled by the parties to said partition."** (R. 35.)

The Circuit Court correctly construed the trial court's findings of fact and conclusions of law when it stated that:

> *"The District Court held that extrinsic evidence * * * was admissible * * * and that the reference to the Wiley Davis corner was inserted in the deed by mistake."*

Petitioner urged in the Circuit Court of Appeals, as disclosed by the opinion, "that the mistake, if any,

was not correctible against bona fide purchasers," and the court said:

> **"In the present case, the scope of the admissible evidence is enlarged by the pleaded issue that the reference to the Wiley Davis corner got into the deed through mistake. On that issue, the case being in equity, parol and other extrinsic evidence of what was done and said was plainly admissible.** The court properly heard the testimony of persons who were present at the survey and it clearly showed that the Northwest corner of Lot No. 2 was deliberately and purposely put about a chain's length East of the Wiley Davis corner so as to leave a strip undivided, and under the control of all four tenants in common for the purposes of a road. * * * The evidence was admissible, and it well warranted the finding of the Judge that the reference to the Wiley Davis corner as the corner of Lot No. 2, was inserted by mistake in drafting the deed."

In the trial court, petitioner objected to the parol evidence of F. E. Rogers, that while the survey was being made, the surveyor told the heirs there was a chain left (meaning it was a chain to the Wiley Davis Northeast corner) and the heirs advised him they would keep the strip like it was, it then being used for a road at that time of the year. (R. 220, 222.) Petitioner urged that such testimony was incompetent in view of the call for the Wiley Davis corner, and it varied the terms of the written instrument. (R. 220.)

Based on such testimony the trial court found that such conversation occurred while the survey was be-

ing made in 1899 (R. 63) and concluded as a matter of law: "that the call for the Wiley Davis corner in the partition deed of 1899 and subsequent instruments following such deed call, should be rejected as inserted by mistake." (R. 70.)

Based on the findings of fact and conclusions of law the trial court reformed, by the decree entered herein, the description of the land included in petitioner's oil and gas lease by cancelling the call for the Wiley Davis Northeast corner. (R. 56.)

To the action and ruling of the court petitioner excepted and assigned error (R. 305-311) and fully briefed in the Circuit Court of Appeals the propositions based on such assignments (Appellant's brief Circuit Court of Appeals, pp. 107-146).

In petitioner's brief in the Circuit Court of Appeals some twenty-five pages were devoted to a discussion of the Texas decisions supporting and settling the proposition that the legal title to the strip of land to the Wiley Davis Northeast corner passed to petitioner, leaving respondents with only an equitable title arising out of their alleged mistake in including more land than they intended to convey.

The opinion of the Circuit Court of Appeals unquestionably shows that they were of the opinion that petitioner owned the legal title to the strip in controversy, but held respondents were entitled to correct their mistake in including the call for the Wiley Davis Northeast corner because petitioner did not prove it was a bona fide purchaser. The crux of the decision was the court's determination that petitioner

had not discharged the burden of proving it was a bona fide purchaser, and is accordingly overruled each of the assignments of error that petitioner was entitled to a decree quieting its title to the strip of land because it owned the legal title and respondents failed to plead and prove it was a mala fide purchaser. In overruling the assignments of error the Circuit Court said:

> "But appellant argues that equity will not correct a mistake as against a bona fide purchaser for value without notice, and that there is no proof that it and its predecessors in the lease were not such. The answer is that there is no sufficient proof that they were. In the law of negotiable instruments presumptions are indulged as to bona fides and want of notice, but in equity a claim to the favored position of a bona fide purchaser for value without notice is a matter of affirmative defense, and he who asserts it has the burden of proving it. Compare United States vs. California & Oregon Land Co., 148 U. S. 31. *It fairly appears that these lessees paid value in developing the lease, but there is no evidence at all that at the time they paid they did not know that the west line was not the east line of Davis, or that the call for 440 yards on the north line would not reach Davis' corner, rendering the corner questionable.* No well was drilled or expenditures made on this disputed strip. There being no proof of bona fides or want of notice, this plea was not sustained. The district judge held the evidence touching the intention of the parties to be admissible on the ground that the deed was am-

> biguous irrespective of the equitable power to correct a mistake in the deed. The cases cited above go far to sustain him, but we find it unnecessary to determine that question in view of the equitable issues pleaded." (Italics ours.)

Petitioner challenged the correctness of the holding of the court above through its motion for rehearing (R. 341-363) urging that under Texas decisions the burden of proof was on respondents to plead and prove petitioner was not a bona fide purchaser (R. 346-348) and that under *Erie Railroad Company v. Tompkins*, the Texas decisions were binding on the Federal Courts (R. 352-353). The original opinion on rehearing was withdrawn for correction (R. 364) after petitioner had filed a second motion for rehearing (R. 370-390), urging that the Texas rule created matters of substantive law and should be followed by Federal Courts under *Erie Railroad Co. v. Tompkins* (R. 380-386).

The motion for rehearing was overruled (R. 397), the court writing a corrected opinion (R. 392-396), stating:

> "The motion for rehearing asserts that in the Texas courts the rule is established that on an issue of bona fide purchase for value without notice the burden of proof is upon him who attacks the legal title and asserts the equity, citing White v. Hix, 104 S. W. (2d) 136; and the contention is made that under the ruling in Erie R. R. Co. v. Tompkins, — U. S. —, the State law should have been applied in this court.
>
> "In 66 C. J. Vendor and Purchaser, sec. 1063,

we find the Texas rule, supported by a multitude of Texas cases, stated as above, but as being exceptional. The rule elsewhere, also supported by abundant authority, is said to be: 'As a general rule the person relying on the defense of a bona fide purchase for value without notice has the burden of proving such defense.' The federal courts have held according to this general rule."

* * *

"This seems to us a matter of practice or procedure and not a matter of substantive law. There is no question as to what are the rights of a bona fide purchaser, or as to whether the facts established make complainant out such, but only a question of how and by whom the facts shall be shown to the court. Such matters are not within the decision in Erie R. R. Co. v. Tompkins, and the cases following it. At the very time these decisions were made, the Supreme Court was putting forward procedural rules to govern uniformly in the courts of the United States the practice in both law and equity cases, and was extending them even to questions of the admissibility of evidence and the competency of witnesses. Rule Civil Procedure 43. The procedure in equity cases has always been governed by a practice uniform over the United States and independent of that in the State courts. This was held proper in federal courts in Louisiana where as in Texas there are no separate courts of equity. Livingston v. Story, 9 Pet. 631, Story v. Livingston, 13 Pet. 358.

"We have here not a case where a Texas statute has created the right asserted, or has created a presumption, or is in any manner to be applied as construed in Texas. The question is simply

what is the proper practice in courts of equity. The practice followed in the State courts of Texas, where equity courts as such do not exist, is not controlling."

The Circuit Court did not overrule petitioner's assignments of error challenging the admissibility of parol testimony to correct a mistake in the deed when the rights of innocent purchaser had intervened on any ground other than that petitioner had not shown it was an innocent purchaser, and in so doing the court stated it was following the weight of authority, although Texas decisions were to the contrary. In dealing with what is *dictum* this court said, in *Florida Central Railroad Company v. Schutte*, 103 U. S. 118:

> "It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here, the precise question was properly presented, fully argued and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended." (103 U. S. p. 143.)

Again, in *Union Pacific Co. v. Mason City Co.*, 199 U. S. 160, the court said:

> "Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in re-

spect thereto can, in no just sense, be called mere dictum." (199 U. S. 166.)

Respondents now urge this court to hold that legal title to the strip in controversy never passed to petitioner because the partition deed and oil and gas lease were ambiguous and parol evidence was admissible to show a mistake was made by them in inserting the call for the Wiley Davis Northeast corner. They countered with this same proposition in the Circuit Court of Appeals, after petitioner herein had filed a brief containing one hundred eighty-eight pages, quoting from the record and discussing Texas decisions holding that the legal title to all the land to an adjoinder called for in a deed vests in the grantee, and if grantor made a mistake in inserting the call for adjoinder, his title is equitable, and he cannot defeat the legal title without pleading and proving the holder of the legal title was a mala fide purchaser. The Circuit Court of Appeals, after considering the authorities cited by petitioner, held that in view of the equitable issues pleaded by respondents, a court of equity had power to correct their mistake because petitioner had not plead and proved it was a bona fide purchaser. Unlike the decisions quoted from above, the Circuit Court of Appeals did not dispose of the case upon some ground other than that discussed in its opinion, *a fortiori*, what the court said about the burden of proof being on petitioner was not *dictum*, but was the court's reason for overruling the assignments of error presented by petitioner in its brief.

Statement Correcting Inaccuracies In Respondents' Brief

A general charge that a brief contains inaccurate statements, without citing portions of the record supporting such charge, is contrary to the rules of this court, and is of no aid to the court in passing on the correctness of the statement. Petitioner made a statement of the case, citing each paragraph and page of the record in support thereof, and its opening statement substantially follows the opinion of the Circuit Court of Appeals, but respondents throughout their brief have hurled general charges without citing the record in support thereof, that petitioner has misstated the record. We feel that such charges should be cautiously made and, whenever made, portions of the record should be cited in support thereof.

Typical of the general charges made by respondents without citing the record, is that contained in the first paragraph on page four to the effect that petitioner's contentions of fact are not supported by the record and foreclosed against it by the findings and holdings of the court below. We are not asking this Court to review the trial court's findings. We say there was placed on petitioner a greater burden than Texas decisions warrant.

We believe we are justified in resenting the accusations made by respondents, and they certainly do not merit consideration of this court for, if they were true, respondents would have cited the record to support the charges carelessly made against petitioner.

In the last paragraph on page five of their brief, respondents state that "the trial court held the cor-

rection lease" naught and void because secured by false representation and fraud and without consideration (Findings of Fact, ¶ 17, page 78; Conclusions of Law, ¶ 4, page 71.)

On page seventy-four respondents devote one of their points to the charge that petitioner has exhibited that character of bad faith in equity, both towards respondents and the court in a matter having immediate and necessary relation to the equity sought by it, as would deny it remedy in a court of equity. Under such point they state that the correction or affirmation lease was obtained by stealth, false representations, fraud and swindle and by criminal means; that lessors executed said so called "confirmation lease" divesting them of the leasehold estate of the land in controversy herein, wholly without consideration. Respondents further falsely represent to this court on page seventy-five that the trial court held "such confirmation lease void as fraudulently acquired."

There is nothing further from the truth than the above statements by respondents. They have been driven to the point of having to charge fraud on the part of petitioner in an effort to support the decision of the Circuit Court.

The opinion of the Circuit Court refutes respondents' charge that the confirmation lease was obtained by fraud wherein the court said:

> "Appellant has a second lease made after a resurvey and containing a differently worded description and it was executed on the assurance

that it covered nothing that was not covered by the first lease, and we agree with the ruling made below that it ought to be given no different effect."

The record shows that the original lease was executed only by the heirs of J. F. Rogers to W. P. Chandler on October 20, 1930 (R. 138), and assigned by Chandler to Empire Gas & Fuel Company on October 21, 1930 (R. 172), the Cities Service Oil Company having thereafter succeeded to the rights of Empire Gas & Fuel Company (R. 49-50, 93).

In April, 1931, Empire Gas & Fuel Company had a survey made of the land covered in its lease, its surveyor being accompanied by J. E. Rogers, one of the heirs of J. F. Rogers, deceased, who pointed out the corners to the surveyors (R. 144).

After completing the survey it was discovered that the two acre tract known as the Mings Tract in the Northwest corner of the J. F. Rogers Tract No. 2, had not been definitely carved out and the Empire Gas & Fuel Company prepared a correction or confirmation lease and presented it to the heirs of J. F. Rogers for signature (R. 161). The Empire Gas & Fuel Company assured the heirs of J. F. Rogers that the confirmation lease included no additional land and they signed it. (R. 169-171.)

Petitioner plead the execution of the confirmation lease (R. 24), calling it a "confirmation lease," thereby showing that it did not contend the lease covered any land in addition to that described in the original lease.

If the partition deed of 1899 did not cover and include the 66 foot strip, then the title remained with the four heirs of Louisa Rogers, which evidences the fact that petitioner was not trying to acquire rights greater than that covered by the original lease, because it had the confirmation lease signed only by those persons executing the original lease. There was certainly no fraud in obtaining a confirmation lease which petitioner never contended covered more land than was described in the original lease.

We are amazed at respondents' statement the trial court found the confirmation lease was void because it was obtained by stealth, false representation, fraud and swindling. Respondents cite paragraph 17, Record page 62, and paragraph 4, Record, page 71, to support their charge and an examination by the court of this portion of the record will be convincing that Respondents have falsely made charges of fraud, unsupported by the record.

The other portion of the record cited by respondents to support their charge is paragraph four of the conclusion of law, wherein the trial court stated:

> "Furthermore, when the complainant, Empire Gas & Fuel Company, represented to the heirs of J. F. Rogers that their correction lease did not cover any more land than the original lease, and thereby obtained the same, it is in no position now to claim otherwise in an equitable action." (R. 71.) * * *
>
> "The correction lease, not taking in more land than the original lease, could not be extended on

> the West and also extended at the Southeast corner, to the East, 68 feet." (R. 72.)

Mr. Cox, a witness called by petitioner, who represented its predecessor in title in obtaining the correction lease, testified he told the heirs of J. F. Rogers that the correction lease called for the same amount of acreage as the original lease (R. 171).

In petitioner's brief in the Circuit Court of Appeals, it stated that it did not contend the correction lease covered more land than the original lease.

Respondents continuing their misstatements and false accusations, state on page seventy-four of their brief in this court:

> "Said lessors executed said so called 'confirmation' lease, divesting themselves of the leasehold estate of the land in controversy herein wholly without consideration."

They have stated that they divested themselves of the leasehold estate of the land in controversy, by executing the correction lease, apparently thinking the confirmation lease covered the 66 foot strip, but petitioner has not claimed it got more land under the confirmation lease than it acquired under the original lease, and if respondents are correct in stating the confirmation lease divested them of the title, then the original lease likewise did. The trial court and the Circuit Court of Appeals held that the confirmation lease covered no more land than the original lease; that such was the representation of the agents of the Empire Gas & Fuel Company and petitioner

did not contend to the contrary. The statement of respondents, on page seventy-five of their brief, that the trial court held the confirmation lease void and fraudulently acquired, is false. The Circuit Court did not decide the case on fraud, and no questions of fraud are before this Court.

Respondents' charges are so ridiculous that they are almost ludicrous. It is consoling, though, to know that respondents have not confined their charges of misquoting the record solely to petitioner, for on page forty-two of their brief, they state the Circuit Court of Appeals misquoted the trial court's findings when it stated that:

> "The court properly heard the testimony of persons who were present at the survey, and it clearly showed that the Northwest corner of lot No. 2 was deliberately and purposely put about a chain's length East of the Wiley Davis corner, so as to leave a strip undivided and under the control of all four tenants in common **for the purpose of a road.**"

We find respondents before this court, disputing the statement by the Circuit Court that the strip was left undivided and under the control of the four tenants **for the purposes of a road.** When they filed their answer in the trial court they plead:

> "Defendants further show that in 1899, when the said north line was actually surveyed on the ground, the line was stopped at 440 yards west of the northwest corner of Lot No. 1, **purposely and so that the original Rogers owners could at all times have an outlet from the North to the**

main public road leading from Gladewater and the west, to Longview, the County site, and to the east on to Shreveport, Louisiana; said public road being some half mile south of the north end of the Rogers 176-acre tract. The Rogers family were hauling logs and timber from the north of said 176 acre tract and other land to the north, **and purposely left a strip on the west side unpartitioned, so that at all times they would have an open outlet, as aforesaid;** and there was no intention to include said strip in said 66 acre tract or to partition same in any respect. And there was no intention to include it in the ratification lease now claimed by plaintiff," (R. 34-35.)

" * * * the northwest corner, as established on the ground, and the southwest corner, as established on the ground, being established at a point 68 feet east of the line claimed by the plaintiff in plaintiff's amended bill of complaint, **this being left out by the surveyor at the request of the Rogers family for a road to be jointly owned and controlled by the parties to the said partition."** (R. 35.)

The Honorable Circuit Court adopted respondents' theory that the 66 foot strip was set aside for the purposes of a road, and respondents, seeing the correctness of petitioner's contention under Texas authorities that title to the strip passed to petitioner because it bounded the tract partitioned to J. F. Rogers, and was to be used for road purposes, now attempt to change their entire theory of the case by saying that the strip was simply omitted from the partition, rendering inapplicable the road doctrine.

Inconsistencies In Respondents' Theories

The record in this case in the trial court was unavoidably long because of the inconsistent positions taken by respondents. They contended to-wit:

(a) The location of the Wiley Davis Northeast corner was not known at the time of the partition survey in 1899, and they denied that it was a well established corner. (R. 30, ¶ IV.)

The burden therefore was on petitioner to show the location of the corner, which it did, and the trial court found the corner was located where petitioner contended (R. 63).

In fact, respondent, F. E. Rogers testified that he knew, in 1899, the location of the Wiley Davis Northeast corner, being familiar with the place where the pine tree stood at the Davis corner. (R. 225.) He testified he knew where the Davis' East line was and there were marked trees along it. (R. 225-226.) The testimony of F. E. Rogers, which the trial court admitted over petitioner's objection, showed that the surveyor and the Rogers' heirs knew in 1899 the location of the Northwest corner of the tract being partitioned, and knew that it was located 880 yards plus 66 feet West of the Northeast corner of the Thomason Survey. Had respondents followed rules of equity procedure by admitting in their answer they knew the location of the Davis corner, as they did, the record in this case would have been simplified.

(b) Respondents further plead that if the court should determine that in 1899 the Wiley Davis cor-

ner was well located on the ground, nevertheless, in making the survey, the surveyor stopped short of the corner 66 feet and the call for the corner was inserted in the partition deed through their mistake. (R. 31.)

(c) They answered that when the survey was made in 1899, the surveyor never ran the West line of the tract partitioned to J. F. Rogers, their allegation being "that the West line South was not run on the ground, or any other of the lines but same was calculated." (R. 34, ¶ IX.)

Directly contrary to such pleading, F. E. Rogers testified that the surveyor ran the West line (R. 222). They even plead:

> "Said Wiley Davis corner was not fixed or located or susceptible of definite ascertainment at the time in 1899 and has not been capable of definite ascertainment since said time and being incapable of definite ascertainment, the call for 440 yards controls." (R. ¶ IX, p. 34.)

This pleading was inserted for the purpose of confusing the issues and extending the record, and the falsity thereof is shown by their own admissions pointed out above.

(d) To further confuse the issues, respondents plead that the Rogers heirs never owned the 66 foot strip but the strip was owned by the Moseley heirs (R. ¶ XII, p. 36), they contending that subsequent to the time they executed the oil and gas lease held by petitioner, they acquired the Moseley title to the

strip. The court also found against them on that contention. (R. ¶ XIV, p. 67.)

(e) To further confuse the issues, respondents answered that if they did not own the strip claimed by petitioner, then they owned a strip along the East side of its lease (R. 41-43) but the court found these facts against them (R. 70-71).

Reply to Respondents' Contention That Title to the Strip Did Not Pass Even Though It Was Set Aside for Road Purposes and Bounded the Tract Partitioned to J. F. Rogers

The Texas rule of property is that a conveyance of land bounded by a public highway carries with it the fee to the highway as part and parcel of the ground and "Such is the legal construction of the grant unless the inference that it was so intended is rebutted by the **express terms** of the grant." (*Mitchell v. Bass*, 26 Tex. 372, 380.) In the original brief filed in this court, the Texas authorities are discussed, and are numerous in holding that the presumption is conclusive unless title to the road is expressly reserved in the deed. Respondents, on page fifty-four of their brief, state "that the presumption relied upon by petitioner is not a conclusive presumption or rule of law" but they cite no Texas authority to support such statement. "Strip hunters" have been so numerous in Texas that the courts have established a rule of property that the presumption is conclusive in the absence of an express reservation in the deed.

Petitioner has cited many Texas authorities holding that failure to mention the road does not militate against the conclusive presumption, and respondents

in reply state that the Texas decisions are inapplicable where the road is not called for as a boundary, but cite no authority to support their contention. The Texas authorities cited and quoted from on page thirty-two of petitioner's brief follow the majority rule in holding that failure to mention the street or highway does not prevent the operation of the rule that title passes.

It is also contended by respondents on page fifty-two of their brief, that title to the strip did not pass because the strip was not a road. In an equitable action a defendant is bound by his pleading, and plaintiff is not required to prove facts admitted or plead by the defendant.

Respondents plead:

> "Defendants further show that in 1899, when the said north line was actually surveyed on the ground, the line was stopped at 440 yards west of the northwest corner of Lot No. 1, purposely and so that the original Rogers owners could at all times have an outlet from the north to the main public road leading from Gladewater and the west to Longview, the County site, and to the east on to Shreveport, Louisiana; said public road being some half mile south of the north end of the Rogers 176 acre tract. The Rogers family were hauling logs and timber from the north of said 176 acre tract and other land to the north, and purposely left a strip on the west side unpartitioned, so that **at all times** they would have an open outlet, as aforesaid; and there was no intention to include said strip in said 66 acre tract or to partition same in any respect. And

there was no intention to include it in the ratification lease now claimed by plaintiff." (R. 34-35, ¶ X) * * *

"Defendants further aver that at the time the partition was made of the Rogers land referred to in plaintiff's bill and also in this answer, the Rogers family, desiring to leave a strip on the west side for an open road * * *." (R. 35, ¶ XI) * * *

"this being left out by the surveyor at the request of the Rogers family **for a road,** to be jointly owned and controlled by the parties to the partition." (R. 35, ¶ XI.)

While it is true that some of the testimony showed the Western edge of the 66 foot strip was being used for a road, it was undisputed that from sometime prior to the partition in 1899 to the discovery of oil in the East Texas field "the road had been open for the use of anyone who wanted to travel it" (R. 223-224).

Mr. Simmons (not the surveyor) called by respondents, testified:

"The road meanders back and forth in between those trees and at the exact spot I do not know whether there is any road or not. The road would wash on one side and then they would get on the other side." (R. 246.) "The road is traveled one place one time and another place another time." (R. 244.)

Mr. Sport, another witness called by respondents, testified:

"The fences must have been at least sixty or seventy feet apart but the road did not take up all the land, however. The road was cut out twenty-five, thirty or forty feet wide. It did not go plumb straight when it was originally cut out. Davis' fence was back ten, fifteen or twenty feet from the West line of the road. * * * Wiley Davis had a fence on the West side of the road running clear up to the school house lot. I do not think, in 1930, before the road was widened, Davis and Rogers' fences were within forty-five feet of each other. I did not measure them. **I was road overseer and people went over the road. In my judgment they were sixty or seventy feet apart. After the fences were put there the road was widened."** (R. 239-240.) * * * **"It was almost in the road. The road wobbled quite a little bit."** (R. 241.)

We do not consider it material that the travel did not cover the 66 feet because the public had the right to use the 66 feet since it had been set aside for road purposes according to respondents' own pleadings and admissions. In fact, Texas authorities and decisions from other jurisdictions are numerous holding that title to the strip set aside for road purposes passes, even though the road was never opened or abandoned. (See original brief, p. 38.)

If there are Texas cases to support respondents' contention, it certainly seems that they would have been able to find them but their failure to do so, as well as the omission by the Circuit Court of Appeals of such authorities, evidences the fact that the Texas

rule is not subject to the exceptions applied by the Circuit Court.

What the Circuit Court Said About the Burden of Proof Being a Matter of Procedure Is Not Dicta

Respondents, in an effort to avoid the application of the doctrine of *Erie Railroad Company v. Tompkins* and *Central Vermont Railway Company v. White*, contend that it was not necessary for the Circuit Court to decide whether the burden of proof was on petitioner to plead and prove it was a bona fide purchaser or on respondents to plead and prove petitioner was a mala fide purchaser. To support their position, they have cited cases like *Blake v. Pure Oil Company*, 100 S. W. (2d) 1009, and others which deal with the location of boundaries, when the right of an innocent purchaser has not intervened. We have read all of the cited cases and not one discloses that the court held a deed could be reformed by deleting a call for an adjoinder without pleading and proving the rights of an innocent purchaser had not intervened. To take each case they cite and discuss the court's holding would unduly lengthen this reply brief. Suffice to say though, the same authorities were cited by respondents in the Circuit Court of Appeals and the court brushed them aside, holding that the turning point in the case was on whom rested the burden of proving petitioner was a bona fide purchaser *vel non*.

Sight is not to be lost of the fact that respondents plead they had made a mistake in inserting the call

for the Davis corner in the partition deed; nor of the fact that the trial court found that the location of the Wiley Davis Northeast corner was on the ground at the place contended by petitioner, and that its location was known to the Rogers heirs at the time the survey was made in 1899. This is necessarily the court's holding (R. 63).

In order to further have equitable grounds upon which to correct the alleged mistake, respondents plead and testified that the surveyor set a stake at the Northwest corner of the tract partitioned to J. F. Rogers, and another stake at the Southwest corner of said tract, but the trial court found that no mention was made of these stakes in the partition deed (R. 64, ¶ VIII), and that the gear shaft which later replaced the stake at the Southwest corner of said tract was not mentioned in any conveyances introduced in evidence by petitioner in its chain of title. (R. 64, ¶ IX.)

To further vary the terms of the partition deed, respondents were permitted to testify that they omitted the 66 foot strip from the partition because they desired to use it for a road. Having plead the mistake, and averring the manner in which the mistake was made, the trial court permitted the introduction of the testimony over petitioner's objection, and found, based thereon, a mistake was made in inserting the call for the Wiley Davis Northeast corner. When petitioner challenged the admissibility of such testimony in the Circuit Court of Appeals, the court said:

> "In the present cause the scope of the admissible evidence is enlarged by the pleaded issue that the reference to the Wiley Davis corner got into the deed by mistake. On that issue, the case being in equity, parol and extrinsic evidence of what was done and said was plainly admissible."

In not one case cited by respondents did the courts of Texas hold that such a mistake could be corrected against innocent purchasers under pleadings as broad as the issues made by respondents in the trial court.

Petitioner, in its brief in the Circuit Court of Appeals, to sustain its contention that respondents' mistake could not be corrected unless they plead and proved petitioner had notice thereof before it acquired its title to the oil and gas leasehold estate, relied upon, among other cases, *Garrison v. Crowell*, 67 Tex. 626, 4 S. W. 69. Since the Circuit Court of Appeals held that the burden of proof in a case was a matter of procedural law and not substantive law we did not, in our brief in this court, discuss at great length the opinion of *Garrison v. Crowell*, which announces the rule that a call for an adjoinder mistakenly inserted in a deed will not be deleted unless the party seeking to reform the deed proves that a subsequent purchaser knew of such mistake. The Circuit Court said that the Texas rule placing the burden of proof on the holder of the equitable title to plead and prove the holder of the legal title was not a bona fide purchaser, was exceptional and against the abundance of authorities in other states, and would not be followed by a Federal Court since it did not create substantive

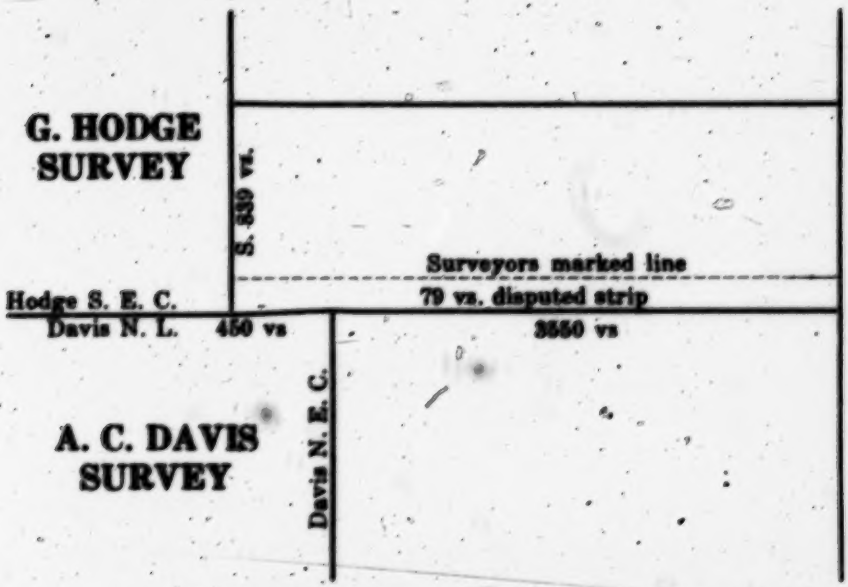
rights, but only procedural rules established by court decisions and not by statute. The question therefore decided was that the Federal Court would not follow the Texas rule, and we saw no benefit to be derived by extending in our brief in this court the discussion of the Texas rule announced in *Garrison v. Crowell*, because, if Federal Courts are not required to follow such state decisions, then they become immaterial.

The following is a reproduction from our brief in the Circuit Court of Appeals of the discussion of the Texas rule, with an addition at the end of the discussion of *Garrison v. Crowell*, a paraphrase of the decision of the Circuit Court in the intsant case and of the Supreme Court of Texas in *Garrison v. Crowell.*

Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69, was written by Associate Justice Gaines, one of the greatest Judges in Texas Jurisprudence at a time when the court was composed of Chief Justice Willie and Associate Justice Stayton.

The facts are very similar to those involved in the case at bar and were as follows: pursuant to a compromise agreement Garrison conveyed to Stephens a tract of land supposedly containing 640 acres. The deed called to begin at the Northwest corner of the tract conveyed and run "*South 839 varas to the Southeast corner of said Hodges survey, on the North boundary line of the A. C. Davis survey.*" This call located the West line of the tract conveyed. The deed called "*thence East at 450 varas, said Davis' Northeast corner at 3550 varas, the East boundary line of said*

Frost survey." This call located the South line of the tract conveyed. The distance called for in the West boundary line of 839 varas did not reach the Davis' survey by some 79 varas but it reached the line actually run at the time the survey was made. The strip lying between the line run by the surveyor and the North boundary line of the Davis tract constituted the area in dispute. We have sketched a plat illustrating the questions of boundary decided by Associate Justice Stayton:



Sometime after the conveyance Stephens, the grantee, moved his fence upon the most Southern line, being the true line of the Davis survey, and took actual possession of the disputed line. Stephens subsequently sold the land to Crowell, who was the Appellee before the Supreme Court. Garrison sued Crowell for the 79 varas strip *upon the theory that the survey*

stopped at the called distance of 839 varas and a line was marked for the South line of the tract conveyed and such line did not coincide with the Davis line. We therefore see that (a) an actual survey was made on the ground and the South boundary line as surveyed was distinctly marked on the ground 79 varas North of the Davis line called for; (b) the surveyor and parties had erroneously thought that the line they marked was the North line of the Davis survey and therefore they were mistaken as to the location of the adjoinders called for; (c) Stephens, the grantee, actually entered into possession of the 79 varas strip and built his fence along the true North line of the Davis survey; (d) Crowell purchased the tract from Stephens, his deed containing the same description as that from Garrison to Stephens; (e) *Crowell had no knowledge that the surveyor had stopped short of the adjoining calls a distance of 79 varas and hacked the South line 79 varas North of the adjoinder called for;* (f) *the hacked line and marked trees were not called for, the deeds calling only for adjoinder and course and distance.*

In holding that Garrison, the original grantor, could not prevail against Crowell the court said:

> **"If it be determined that Crowell is a bona fide purchaser, without notice, of the land in question the judgment must be affirmed without reference to any other question presented by this appeal, and we have no doubt that he must be so held. It does not appear that he knew that the distance of the west line called for in the deed would not reach the Hodges corner and the Davis line;**

therefore, there was nothing on the face of the conveyance to put him upon inquiry as to any claim on the part of appellant. He found Stephens in possession of the premises in controversy, holding under a duly recorded deed from appellant himself, which, according to well established rules of construction, embraced the land so possessed. He paid his money upon the faith of a conveyance which imputed an absolute title in his vendor, at least against appellant in this case, and we fail to see any reason why he should be excepted from the rule which protects the innocent purchaser for value against the claim of his adversary which was unknown to him at the time of his purchase. The case of Houston v. Sneed, 15 Texas 307, cited by appellant's counsel, does not sustain the proposition submitted by them upon this point. In that case Sneed was held not to be an innocent purchaser, because, at the time of his conveyance, Houston was in actual possession of the land up to the disputed line. This was considered as constructive notice to him of Houston's claim. But the court say: 'Had there been no settlement up to the agreed line, and no notice to him of it, he might have insisted upon the line originally established between Houston and McKinney called for by his deed.' It is evident that, in so far as the opinion bears upon this case, the authority is against appellant and not in his favor. The court below found against appellant upon the main proposition presented by his pleading; that is, that the Hodges corner and Davis line were called for in the deed by mistake, and we are inclined to think that this finding is correct. But we need not consider that question. Appellee

Crowell being a bona fide purchaser for value, appellant cannot recover." (Pp. 628-629.)

An application of the decision and facts in the *Crowell* case to the case at bar completely emasculates the contentions of Appellees. The only difference in the facts are in favor of Appellants' contentions, and we think our position is even stronger under the court's findings.

First: In the *Crowell* case the surveyor, Garrison and Stephens were mistaken as to the location of the adjoinder. In our case Simmons and the four Rogers heirs knew the location of the Wiley Davis Northeast corner. The mistake in the deed from Garrison to Stephens was as to the actual location of the land described, while in the case at bar if there was any mistake it was not one as to the location of the Wiley Davis Northeast corner, but was in including more land than the heirs intended. We think in this respect our case is stronger than the *Crowell* case and for all the more reason the rights of an innocent purchaser should be protected. Appellees took the position that the surveyor did not know the location of the Wiley Davis corner and if such position was correctly taken, then the facts are identical with the *Crowell* case. We believe though the findings by the court are that the surveyor and the Rogers heirs knew the location of the Davis corner.

Second: In the *Crowell* case, Stephens, the original grantee from Garrison, took possession of the disputed strip and was in possession at the time he conveyed to Crowell. In the case at bar the disputed

strip actually constituted a road and certainly Appellees were not in possession of the road. The fact that Stephens was in possession of the disputed strip negatived the possession of Garrison and therefore there was nothing to charge Crowell with Garrison's claim to the strip. The heirs of Louisa Rogers were not in possession of the road, and when Chandler and Appellant acquired the oil and gas lease there was no possession of Appellees to charge Appellant with notice that Appellees were claiming some interest in the road. On the other hand, Appellant was entitled to rely upon the presumption that the four heirs intended for the title to the road to pass to J. F. Rogers because they did not expressly reserve such title in the partition deed.

Third: In the *Crowell* case the trial court found that the call for adjoinder had not been inserted through mistake, although he found that the surveyor stopped short of the adjoinder 79 varas and marked the South line. The court in the case at bar found that the call for the Wiley Davis Northeast corner was inserted through mistake because he found that the surveyor stopped 66 feet short of the Wiley Davis Northeast corner and marked a line South. Certainly, if there was no mistake in the *Crowell* case, there was none in the case at bar because in following the footsteps of each surveyor the courts found that they stopped short of the adjoinder and marked a line. Justice Gaines brushed aside the finding of the trial court that the adjoinder was called for through mistake, saying:

"but we need not consider that question. Appellee Crowell being a bona fide purchaser for value, Appellant could not recover."

We therefore think that extrinsic evidence was inadmissible and could not form the basis for the decree entered in this case. The court should have concluded as a matter of law Appellant was an innocent purchaser and acquired title to the land adjacent to the Wiley Davis Northeast corner.

CASE AT BAR

"shall the measurement of 440 yards for the North line prevail or shall the call for the Wiley Davis' Northeast corner control?"

"It fairly appears that these lessees paid value in developing the lease, but there is no evidence at all that at the time they paid they did not know that the West line was not the East line of the Davis, or the call for 440 yards on the North line would not reach Davis' corner, rendering the corner questionable."

GARRISON V. CROWELL

"The distance called for in the West boundary line does not reach the Davis survey by some 79 vrs., but does reach the line actually run at the time the survey was made. The strip lying between the latter line and that made by the North boundary line of the Davis tract, and its extension, is the matter of contention in this suit." (67 Tex. 627.)

"If it be determined that Crowell is a bona fide purchaser, without notice, of the land in question, the judgment must be affirmed without reference to any other question presented by this appeal, and we have no doubt that he must be so held. It does not appear that he knew that the distance of the West line called for in the deed

would not reach the Hodges corner and the Davis line; therefore, there was nothing on the face of the conveyance to put him upon inquiry as to any claim on the part of appellant." (67 Tex. 628.)

"There being no proof of bona fides or want of notice, this plea was not sustained.

"But appellant argues that equity will not correct a mistake as against a bona fide purchaser for value without notice, and that there is no proof that it and its predecessors in the lease were not such. The answer is that there is no sufficient proof that they were.

"He paid his money upon the faith of a conveyance which imputed an absolute title in his vendor, at least against appellant in this case, and we fail to see any reason why he should be excepted from the rule which protects the innocent purchaser for value against the claim of his adversary which was unknown to him at the time of his purchase." (67 Tex. 628.)

The motion for rehearing asserts that in the Texas courts the rule is established that on an issue of bona fide purchaser for value without notice the burden of proof is upon him who attacks the legal title and asserts the equity, citing White v. Hix, 104 S. W. (2d) 136 and the contention is made that under the ruling in Erie Railway Co. v. Tompkins, the state law should have been applied in this court.

"In 66 Cor. Jur. Vendor and Purchaser, sec. 1063, we find the Texas rule supported

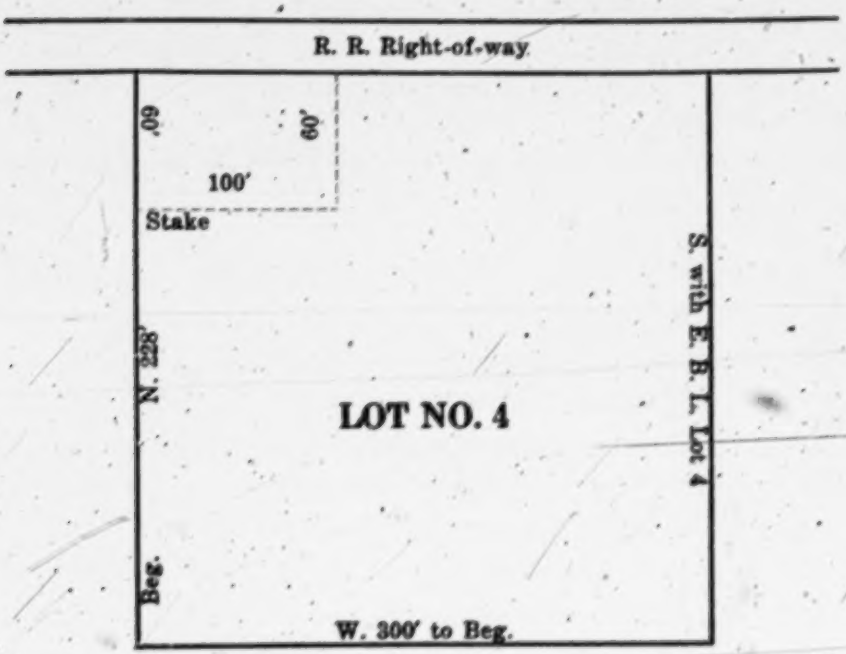
by a multitude of Texas cases stated as above, but as being exceptional."

The *Crowell* case was cited and followed in *Miller v. Southland Insurance Company* (Tex. Civ. App.), 68 S. W. (2d) 558, in which the facts show that P. E. Miller conveyed to Athens Pottery Company, a joint stock association, the following described tract of land:

> "Beginning at the Southwest corner of said Large Lot No. 4;
>
> "Thence North 228 feet a stake for corner;
>
> "Thence in an Easterly direction with the South boundary line of the right of way of the T. & N. O. RR. Co. to a point where said right of way intersects the East boundary line of said Large Lot No. 4, a stake for corner;
>
> "Thence South with the East Boundary line of said Large Lot No. 4, to the Southeast corner of same;
>
> "Thence West 300 feet to place of beginning." (P. 559.)

Later, the Athens Pottery Company, a joint stock association, conveyed by the same description to the Athens Pottery Company, a corporation. The Athens Pottery Company, a corporation, then conveyed to M. K. Miller the land by the same description as in the foregoing deeds. M. K. Miller then conveyed the land by the same description to H. B. Seay in trust to secure payment of certain notes in favor of Southland Life Insurance Company. Miller sued the Southland Life Insurance Company to recover a tract 60

feet x 100 feet out of the Northeast corner of the tract conveyed, contending that the field note description did not cover said tract. On the trial of the case Miller testified that he and his surveyor laid out the tract at the time of the conveyance to the Athens Pottery Company and they had begun at the Souhwest corner and measured North 228 feet to a point 60 feet South of the right of way and set a stake and then they had run Easterly paralleling the right of way 100 feet and then North 60 feet to the right of way, leaving a lot 60 x 100 feet in the corner for his home. He testified that he had no intention to include the lot in the conveyance to the Athens Pottery Company. The plat below illustrates the location of the tract 60 x 100 feet with reference to the larger tract.



Miller sued to reform the deed to the Athens Pottery Company and the deed of trust by excluding the tract 60 x 100 feet. *The evidence showed that the call "thence North 228 feet a stake for corner" did not reach the railroad right of way.* This call did not call for the railroad right of way but actually called for a stake. The next call was *"then in an Easterly direction with the South boundary line of the right of way of the T. & N. O. R. R. Co. to a point where said right of way intersects the East boundary line of said large lot No. 4, a stake for corner."* It was Miller's contention that since the called distance of 228 feet did not reach the right of way by 60 feet the deed was ambiguous and parol testimony was admissible to show that the surveyor stopped at 228 feet and then went East and North, cutting out the lot 60 x 100 feet. It is to be noted that the deed actually called for a stake at 228 feet. The trial court instructed a verdict against Miller and the Court of Civil Appeals on an original hearing reversed and remanded the case but on rehearing affirmed the case after its attention had been called to the *Crowell* case. The court held that the insurance company was an innocent purchaser because it was entitled to rely upon the call for an adjoinder with the railroad right of way and parol evidence was not admissible to show that the surveyor stopped short of the railroad right of way. The court said:

> **"In the present case the residence in the northwest corner of the tract burned some time before the insurance company acquired its lien. M. K. Miller, the borrower, was in possession of the**

> **entire lot from the railway south to the south boundary line. Miller had constructed buildings along the whole of the west line of the property. Appellants' representative inspected the property and there was nothing in its physical aspect or in its occupancy which could have put the insurance company upon notice of any claim adverse to M. K. Miller. Under these circumstances and the authority of the case cited, we hold the insurance company, as a bona fide lienholder without notice, is protected against the adverse claim of title of appellants arising out of the boundary dispute; and, since the jury found the property had been abandoned as a homestead at the time it was conveyed to M. K. Miller, the judgment in favor of the insurance company should be affirmed."** (563.)

The rule that a call for adjoinder will ordinarily be given controlling effect over a call for course and distance is too well settled to require the citation of authorities. An exception to the rule of construction is that when an adjoinder call is inserted through conjecture, or under a mistaken belief as to its location, the call will be rejected and course and distance given effect. *Blake v. Pure Oil Company* (Tex. Com. App.), 100 S. W. (2d) 1009.

The mistake made by the heirs, if any, according to the trial court's findings, was not as to the location of the adjoinder but in including more land than they intended to convey. We do not think the mistake the heirs made is such as would justify the court in deleting the call from the instruments in Appellant's chain of title. Appellees knew the location of the

Wiley Davis Northeast corner and their deed passed the legal title to the tract of land adjacent thereto. When appellant acquired its title it did not know that the heirs had met 66 feet East of the Wiley Davis Northeast corner and decided to leave the strip unpartitioned for a road. There was no ambiguity on the face of the deed and there was no testimony showing Appellant knew at the time it acquired its title that the distance call of 440 yards would not reach the Wiley Davis Northeast corner.

The description in the partition deed and oil and gas lease passed the legal title to the 66 foot strip. In *Swann v. Mills* (Tex. Civ. App.), 219 S. W. 850 (writ dismissed), the facts howed that Ingraham conveyed to Bellamy a tract calling to begin "at the Northwest corner of the said R. E. Neil Survey; thence South 1515 varas to the Southwest corner of said Neil Survey." A survey was made and a line marked by the surveyor where he thought the true West boundary line of the Neil Survey was located but in fact such line was located further West. The court held that since the description called for the survey line the grantee was vested with legal title to the strip of land between the true West boundary line of the Neil Survey and the marked survey line and said in its opinion:

> "* * * Whether Ingraham intended to do so or not, he executed a deed which conveyed to the true west boundary line of the Neil survey and thereby invested his grantee with the legal title to all he described. Whatever interest remained in him by reason of a mistake in thus describing

> **the land was an equity, of which there was no written record. One purchasing from Ingraham's grantee without notice of that equity would acquire title to all the land described in the deed."**

If Appellees through mistake inserted the call for the Wiley Davis Northeast corner, intending to omit the 66 foot strip they owned only an equitable title, of which there was no record. Their rights being equitable and Appellant's rights being legal the burden was on them to plead and prove Appellant was not an innocent purchaser. *Teagarden v. Godley Lumber Company*, 105 Tex. 616, 154 S. W. 973.

After spending much time in attempting to distinguish the case at bar from *Garrison v. Crowell*, respondents finally, on page 34 state:

> "If they ever were the law of this State on this point, which we deny, it is certain that the numerous cases of our Supreme Court itself, recently decided, as above quoted and referred to, effectually relegate them to the realm of abandoned doctrine. But it does appear that, as presented, they mislead the Honorable Circuit Court of Appeals, who apparently accepted them as submitted by petitioner; nevertheless said court cited abundant and more recent authority of our Supreme Court to the contrary."

The doctrine of *Garrison v. Crowell* has never been overruled and has not been abandoned, the case having been cited and followed as late as January 18,

1934, in *Miller v. Southland Life Insurance Company*, supra.

As shown by the assignments of error briefed in the Circuit Court of Appeals, the question was squarely presented on whom the burden of proof rested to establish that petitioner was or was not a bona fide purchaser, and the Circuit Court of Appeals pointedly held that, although if the case had been tried in a court of Texas, the burden would have been on respondents to have proved petitioner was not an innocent purchaser, nevertheless the Texas rule was exceptional, and being a matter of procedure or practice and not a matter of substantive law, would not be followed by a Federal Court.

In briefing the case in this court we devoted a major portion of our discussion to the question of whether the Texas rule was one of procedure or substantive law, and whether it should have been followed by the Circuit Court of Appeals. We believe this is the main issue before the court, and if the Federal Court must follow the state rule on questions of presumptions and burden of proof attended with the purchase of the legal title, then the case must be reversed and judgment rendered for petitioner.

However, irrespective of the decision of the court on this proposition, we believe the case should be reversed and rendered on account of error of the Circuit Court of Appeals in holding that title to the strip set aside for road purposes did not pass to petitioner

because the road was not mentioned in the partition deed and the travel was not over the entire 66 feet.

Respectfully submitted,

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1938

No. 8[redacted]28

CITIES SERVICE OIL COMPANY, *Petitioner*

vs.

B. P. DUNLAP, ET AL., *Respondents*

OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Supreme Court of the United States:

B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband Azzie Waskom, Respondents in the above styled cause, desire to avail themselves of the privilege granted in Section 3 of Rule 38 of this Honorable Court to file herein forty printed copies of an opposing brief to the petition for certiorari; and to such end would respectfully show unto the Court:

Statement

Petitioner's Statement cannot be accepted as correct. Facts are assumed and legal principles announced on the assumed facts. The Circuit Court of Appeals makes a more accurate and satisfactory statement, which we adopt as a sufficient statement of the nature and result of the suit. (R. 330 and 392.) 100 Fed. (2d) 294; original opinion; 101 Fed. (2d) 314, on rehearing.

The petitioner, under the heading **"Reasons for allowance of Writ of Certiorari"** has enumerated eight reasons, but in the supporting brief advances five only which it deems to come within Supreme Court Rule 38, paragraph 5, effective February 27, 1939 (59 Sup. Ct. ix).

The first three of the five address themselves to the contention of petitioner that the Circuit Court of Appeals has disregarded the Texas cases announcing and following the common law doctrine that a conveyance of land bounded on a public highway carries with it the fee to the center of the road, etc.

Discussion of the First Three Points Urged by Petitioner

The Circuit Court of Appeals did not disregard the Texas cases at all. It held that the cases relied upon by petitioner were not in point on the facts of the case here. No case, Texas or otherwise, cited by petitioner, falls within the facts of the instant case.

Every case where the rule contended for by petitioner has been applied by the Texas courts is one of three kinds:

(1) The described tract actually margined a road;

(2) The metes and bounds description of the described tract call for a road, highway or street as a boundary; or

(3) The tract was purchased with reference to a map or plat showing it to be margined by a road, highway or street.

The facts here do not bring this case within any of said three classes of cases.

The Circuit Court of Appeals correctly disposed of the contention of petitioner in its opinion, by showing that the land of the petitioner, when confined to its metes and bounds calls, does not margin on any road; that no instrument in the chain of title has a call for a road, highway or street as a boundary of the tract; and that there is no map or plat showing it to be margined by a road, highway or street, with reference to which petitioner or anyone else purchased.

The Circuit Court of Appeals says [R. 330 (336), 100 Fed. (2d) 294 (297)]:

> "Appellant strongly argues that although it be established that the call for the Wiley Davis corner does not belong in the deed, under settled rules of law the conveying of the land adjoining a road will carry the grantor's title to the servient fee up to

the center of the road, and if the grantor has no land beyond the road the grantor's title to its further edge will pass. Such is the general rule applied both to highways and streets and alleys, nonnavigable streams and railroad rights-of-way. 8 Am. Jur., Boundaries, Sections 36, 39, 22, 25; 11 C. J. S., Boundaries, Section 31, 35, 45. It is based on the presumed intention of the parties that the grantor would not reserve a long, narrow strip under such way or stream for which he had no use, and partly on public policy in that such strips are likely to give rise to litigation in the distant future. But it is not unlawful to retain such a strip. If the intention to do so is clear, the contrary presumption must yield. And if the conveyance as made does not reach the highway or stream, it cannot be extended to it to avoid creating a separately owned strip. There was in 1899 no highway or street or alley covering the strip in question. A highway ran east and west through the land to be partitioned near its center. The Rogers brothers had run a sawmill on their land, and had hauled logs along the line of Davis to this highway. It was not a publicly worked way, or an established road. About this time, the date not being clearly fixed, Davis wished to confine the travel across his place, and he testified he gave fifteen feet along the east edge of his land for a north and south road. Several witnesses say they helped cut the road out fifteen or twenty feet wide, cutting the line trees on the Davis line because they were in the road. The big pine at the Wiley Davis northeast corner was cut close to the ground and its stump was in the middle of the road. It was thereafter a country road open to all, although little used. The fences, where there were any, on either side were sixty or seventy feet apart,

but not straight, and probably were not regarded as correct line fences. The land, as we understand, was mostly in woods. The actual road was thus only twenty feet wide, and supposed to be half on the land of Davis. Assuming it to have been in existence in 1899, the northwest and southwest corners which the surveyor fixed for Lot No. 2 were about sixty-six feet from the center of this road and fifty-six feet from its margin. Neither the deed nor the field notes say anything about a road. This is not a case in which a road is mentioned as a boundary, nor one in which the boundary fixed is in fact the edge of a road either public or private. The only thing that tends to make the strip in contest a road, or the equivalent of a road, is the parol evidence that the Rogers brothers during the survey informed the surveyor, as found by the Court, that 'They would leave the 66 feet out of the partition and use the same jointly, and keep it like it was; the same 66 foot tract was then being used *in part* as a logging road.' There was no covenant to dedicate the strip to the public as a road. It was subjected to no easement over the whole of it so as to convert the whole strip into a roadway. There is plainly expressed intention not to add the strip to Lot No. 2 but to retain joint control and ownership of it. Since the deed as prepared said nothing about a road as a boundary, there was no occasion to make a reservation of the land, though to some extent on its far edge it was used for a road. The case presented is not one requiring an extension of the deed beyond its true calls. In recent years a broad public road occupying most of the strip has been laid out, but this development years after the making of the deed cannot have the effect of extending its scope. 11 C. J. S., Boundaries, Sec. 35 (4)."

The petitioner contends that the Circuit Court of Appeals disregarded the Texas cases of Gulf Production Co. v. Warren, 99 S. W. (2d) 616, and Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080, on the question of the admission of the testimony of F. E. Rogers, in substance that the land in controversy was left out of the partition of 1899 intentionally.

The Circuit Court of Appeals [R. 330 (334); 100 Fed. (2d) 294 (296)] said:

> "In the effort to include just the land the parties intended, which is the true object in all questions of boundary, shall the measurement of 440 yards for the north line prevail, or shall the call for Wiley Davis' northeast corner control? The appellant correctly contends that there is a presumption that the parties intended to divide all their land and especially not to leave a narrow strip off to one side; and that it is a general rule that courses and distances, because of the greater possibility of error in them, will yield to a call for a fixed monument, including the line or corner of an adjoiner. Camp v. Gulf Production Co., 122 Tex. 383, 61 S. W. (2d) 773; Goodson v. Fitzgerald, Tex. Civ. App., 135 S. W. 696; 8 Am. Jur., Boundaries, Sections 51, 53, 56. But the presumption stated is rebuttable; and the rule not without exceptions. It sometimes appears that the measurements are more likely correct than the call for some monument or adjoiner, or that such call was inserted by error; and when that is clearly true the mistaken call will be rejected and the measurements followed even in cases at law. White v. Luning, 93 U. S. 514, 23 L. Ed. 938; State v. Sullivan, 127 Tex.

528, 92 S. W. (2d) 228; Wilson v. Giraud, 111 Tex. 253, 231 S. W. 1074; Caswell v. Faulk, Tex. Civ. App., 97 S. W. (2d) 341, error refused; Humble Oil Co. v. State, Tex. Civ. App., 104 S. W. (2d) 174, error refused; 8 Am. Jur., Boundaries, Sec. 52. In the present case the scope of the admissible evidence is enlarged by the pleaded issue that the reference to the Wiley Davis corner got into the deed through mistake. On that issue, the case being in equity, parol and other extrinsic evidence of what was done and said was plainly admissible. The Court properly heard the testimony of persons who were present at the survey, and it clearly showed that the northwest corner of Lot No. 2 was deliberately and purposely put about a chain's length east of the Wiley Davis corner so as to leave a strip undivided and under the control of all four tenants in common for the purpose of a road. The planting of the heavy gear shaft at the same distance from the Davis line at the south end powerfully sustains this testimony. Most evidently it marked a permanent corner. The evidence was admissible, and it well warranted the finding of the judge that the reference to the Wiley Davis corner as the corner of Lot No. 2 was inserted by mistake in drafting the deed. Appellant argues that the field notes of the survey contradict the witnesses as to where the surveyor went and how he located the corners of Lot No. 2. It so happens that the field notes of Lot No. 2 have not been found. Those for the other lots do not show the surveyor at or near the Wiley Davis corner, or measuring the north line 440 yards or any other length, for this line was not common to the other lots. Only the field notes for Lot No. 2 would show what was done at or near the northwest corner of that lot.

There is no contradiction of the witnesses by the field notes introduced."

The principles of law announced are based on the facts of the case as stated by the Circuit Court of Appeals as follows [R. 330 (382); 100 Fed. (2d) 294]:

"The first lease copied exactly the calls of the partition deed to J. F. Rogers, as follows: 'Being a part of the G. A. Thomas HR; starting at the N.E. corner of Lot No. 2, which is the N.W. corner of W. H. Rogers' tract, Lot No. 1, running West 440 yards to Wiley Davis' N.E. corner; thence south 880 yards; thence east 224 yards; thence north 310 yards at 12 deg. east of north; thence east 754 yards; to W. H. Rogers line, thence north 574 yards to the starting point; containing 68-1/5 acres more or less.' On its face, this survey is out of balance. The total west measurement is 440 yards. The east measurements are 224 and 574 yards, a total of 798 yards beside the easterly gain in the line which runs 310 yards 12 deg. east or north. All agree that the partition deeds, which are of the same date and between the same parties, recite the same consideration, and each in form a warranty deed to the grantee from the other tenants in common and duly recorded, are to be construed together as one transaction. Comparing them, it appears that the east and west line set down in the deed to J. F. Rogers as 754 yards long continues as a part of the south boundary of Lot No. 1 for 66 yards further. This entire line appears in the deed to the F. E. and J. W. Rogers part as 220 yards long, showing that 754 is a clerical error for 154, because 154 plus 66 makes 220 yards. Thus corrected, the J. F. Rogers east and west measurements ap-

proximately balance. They also work out correctly on the land. The northeast corner of the original tract is known, and is the northeast corner of Lot No. 1. The northwest corner of Lot No. 1 is by the deed to W. H. Rogers fixed 440 yards to the west, and was in 1930 a marked corner. That is the northeast corner of Lot No. 2, the J. F. Rogers tract, and the beginning and ending point for the calls in the deed to him. The northwest corner (ignoring the Wiley Davis corner) is called for as 440 yards to the west. Thence the course is south 880 chains (yards), the deed mentioning no marker there but there being at this point a heavy iron shaft with a beveled gear on it planted, as is testified, soon after the survey to mark the corner, and it has been reputed to be the corner ever since. The courses and distances following thence, after the correction of 754 to 154 yards, reach the west line of Lot No. 2 and proceed along it to the beginning with fair accuracy. On the other hand, if the north line of Lot No. 2 is not stopped at 440 yards but is continued about 66 feet to Wiley Davis' N.E. corner, which was a known point in 1899 and ever since, and if the survey is continued thence, the beveled gear shaft will be missed at the southwest corner by 66 feet, the west lines of Lot No. 1 will not be reached by that distance, nor will the beginning point be."*

So it is clear that the Circuit Court of Appeals did not erroneously disregard the cases cited by petitioner, but followed the Texas cases cited, of State v. Sullivan,

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*See appendix for testimony of petitioner's surveyors and explanation of the testimony as applied to maps used in the trial in the District Court.

127 Tex. 525, 92 S. W. (2d) 228; Wilson v. Giraud, 111 Tex. 253, 231 S. W. 1074; Caswell v. Faulk, 97 S. W. (2d) 341, error refused; Humble Oil Co. v. State, 104 S. W. (2d) 174, error refused. There are many more Texas cases to the same effect, such as **Blake v. Pure Oil Company**, 128 Tex. 536, 100 S. W. (2d) 1009, and **Beck v. Gulf Production Company**, 113 S. W. (2d) 258, error refused; **Gill v. Peterson**, 86 S. W. (2d) 629.

In the Beck case, it is said:

> "The field notes to block 5 and the other 8 blocks upon their face are unambiguous, but when they are applied upon the ground various ambiguities and inconsistencies appear. Under such circumstances parol evidence is admissible to show where on the ground the surveys were actually made. Gill v. Peterson, 126 Tex. 216, 86 S. W. (2d) 629; Blake v. Pure Oil Co., Tex. Com. App., 100 S. W. (2d) 1009."

Also typical is the language of the Court in **Blake v. Pure Oil Company**, 128 Tex. 536, 100 S. W. (2d) 1009, wherein it is said:

> "Parol evidence is admissible to show where on the ground a survey or a line of a survey was actually made, when the calls in the field notes or deed are conflicting or ambiguous, or when the effort to apply the description to the ground gives rise to ambiguity."

State v. Sullivan, 127 Tex. 525, 92 S. W. (2d) 228, is a controlling authority on the question, and there it is said:

"Where the facts conclusively show that the surveyor through mistake or by conjecture called for the adjoinder, the call for adjoinder does not control over course and distance, even though the line or corner called for was marked. In such situation the call for adjoinder will be rejected, as inserted by mistake, and controlling effect given to course and distance from known and undisputed corners, when under the facts of the particular case such construction of the survey is 'most consistent with the intention to be derived from the entire description.' This method of construction by the rejection of a call for adjoinder inserted by mistake is most consistent with the true intention if its effect is to harmonize the other terms of the field notes and to disregard as few of the calls as possible."

The Texas Court of Civil Appeals at Austin, in the recent case of **Humble Oil & Refining Company v. State**, 104 S. W. (2d) 174 (179), error refused, quoted the above language from **State v. Sullivan** (supra) with approval.

So, we take it that the Circuit Court of Appeals was clearly correct in its decision in holding the testimony of F. E. Rogers admissible.

Discussion of Point Four Urged by Petitioner

The petitioner contends that the Circuit Court of Appeals has refused to follow Texas cases with respect to the burden of proof on petitioner's plea of innocent purchaser, and that the decision of the Circuit Court of Appeals in this respect is directly contrary to the **Erie**

and Ruhlin cases. (Erie Railroad Co. v Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1187, 114 A. L. R. 1487; Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. 860, 82 L. Ed. 1290).

In the original opinion, R. 330, 100 Fed. (2d) 294 (297), the Circuit Court of Appeals disposes of this contention as follows:

> "But appellant argues that equity will not correct a mistake as against a bona fide purchaser for value without notice, and that there is no proof that it and its predecessors in the lease were not such. The answer is that there is no sufficient proof that they were. In the law of negotiable instruments presumptions are indulged as to bona fides and want of notice, but in equity a claim to the favored position of a bona fide purchaser for value without notice is a matter of affirmative defense, and he who asserts it has the burden of proving it. Compare United States v. California & Oregon Land Co., 148 U. S. 31, 13 S. Ct. 458, 37 L. Ed. 354. It fairly appears that these lessees paid value in developing the lease, but there is no evidence at all that at the time they paid they did not know that the west line was not the east line of Davis, or that the call for 440 yards on the north line would not reach Davis' corner, rendering the corner questionable. No well was drilled or expenditures made on this disputed strip. There being no proof of bona fides or want of notice, this plea was not sustained. The district judge held the evidence touching the intention of the parties to be admissible on the ground that the deed was ambiguous irrespective of the equitable power to cor-

rect a mistake in the deed. **The cases cited above go far to sustain him, but we find it unnecessary to determine that question in view of the equitable issues pleaded.**" (Emphasis ours.)

We are of opinion that the Texas cases are to the effect that the evidence touching the intention of the parties was admissible on the ground that the deed was ambiguous, particularly when, as here, it is shown that the calls in the field notes are conflicting or ambiguous, and where, as here, it is shown that when an effort is made to apply the description to the ground there arises an ambiguity. In these circumstances, the question of innocent purchaser was not in the case. And, of course, if that question was not necessary to the decision, the Circuit Court of Appeals, without doubt, has correctly decided the case. In that event, we need not consider whether or not Erie R. R. v. Tompkins (supra) has any application here.

The District Judge found that when the field notes of Lot 2 of the partition of 1899 were applied to the ground, an ambiguity was created. (R. 70.)

The Circuit Court of Appeals pointed out that the field notes, on their face, were out of balance; that when applied to the ground, if effect be given to the call for the Wiley Davis corner, the old bevel gear for the southwest corner will be missed by 66 feet; the west lines of Lot 1 will not be reached by 66 feet, and the beginning point of the survey will not be reached. In other words, the field notes of the survey will not close.

(Original opinion, 100 Fed. (2d) 294 (296).) (R. 330 (333)).

The district judge found (R. 69) that the surveyors of the Complainant (Petitioner) testified that there was an ambiguity in the partition deed and in the lease of the Complainant when it was attempted to be applied to the ground, and upon such finding made his conclusions of law (R. 69-70) in accordance with the conclusions announced by the Circuit Court of Appeals.

In these circumstances, the innocent purchaser issue was not in the case, and it was not necessary for the Circuit Court of Appeals to discuss the issue.

The only question before the Circuit Court of Appeals, necessary to its decision, was one of the construction of the calls of the deed and giving effect to the intention of the parties. **State v. Sullivan**, 127 Tex. 525, 92 S. W. (2d) 228; **Blake v. Pure Oil Company**, 128 Tex. 536, 100 S. W. (2d) 1009; **Humble Oil & Refining Co. v. State**, 1[illegible] S. W. (2d) 174 (179); **Beck v. Gulf Production Co.**, 113 S. W. (2d) 258 (261); **Gill v. Peterson**, 126 Tex. 236, 86 S. W. (2d) 629.

The trial court and the Circuit Court of Appeals but followed the Texas cases, and properly so; for, as said by the Texas Supreme Court, speaking through Judge Smedley of the Commission, in Gill v. Peterson, wherein he referred to the Texas Supreme Court case of Davis v. George, 102 Tex. 106 (110), 134 S. W. 326):

"It is to be observed, however, as held in the authority last cited, and in many others, that parol evidence is admissible to show where, on the ground a survey was actually made, when the calls in the field notes or deed are conflicting or ambiguous, or when the effort to apply the description to the ground gives rise to ambiguity. Hughes v. Sandal, 25 Tex. 162, 164; Thompson v. Langdon, 87 Tex. 254, 258, 28 S. W. 931, 935; Johnson v. Archibald, 78 Tex. 96, 102, 14 S. W. 266, 22 Am. St. Rep. 27; Wilson v. Giraud, 111 Tex. 253, 263, 231 S. W. 1074, 1078. The purpose of admitting the parol evidence under such circumstances 'is not to override that which is written, but to properly interpret it'."

However, if it be thought that the question of innocent purchaser was in the case, nevertheless the Circuit Court of Appeals correctly decided the issue. This is a case in equity, commenced by the petitioner by filing its bill in equity in the District Court for the Eastern District of Texas, Tyler Division. The Federal equity rules of 1912 were in effect when the bill was filed and were in effect when the case was tried. The Equity Rules have the force and effect of a Federal statute. The equity practice under the Equity Rules is the same in all the States of the Union. (28 U. S. C. A., Sec. 723, and cases cited under Note 12, page 44.)

In an equity case, it seems that the defense of innocent purchaser is an affirmative one, to be pleaded and proved by him who asserts it. **Boone v. Chiles**, 10 Pet. 177. The Circuit Court of Appeals quotes from this authority, in its opinion on rehearing, 101 Fed. (2d) 314

(315). **Boone v. Chiles** was cited and followed by the Supreme Court of the United States in Wright-Blodgett Company v. United States, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637, in an opinion written by the present Chief Justice. In that opinion, the then Mr. Justice Hughes, in speaking of the defense of innocent purchaser in an equity case, said: "But this is an affirmative defense which the grantee must establish in order to defeat the government's right to the cancellation of the conveyance which fraud alone is shown to have induced." He then quotes from **Boone v. Chiles** at length, citing numerous authorities (35 Sup. Ct. 339 (341).

The petitioner complains of the ruling of the Circuit Court of Appeals wherein it said that "the recital, moreover, according to the Federal cases above referred to, is no evidence at all of payment as against the defendants." (101 Fed. (2d) 314 (315). Not only is such recital no evidence at all of payment, as against the defendants, according to the Federal cases, but likewise is no evidence at all of payment as against these defendants under the Texas Supreme Court case of **Watkins v. Edwards**, 23 Tex. 443. This case cites with approval Boone v. Chiles, 10 Pet. 177 (211).

As said by the Circuit Court of Appeals (101 Fed. (2d) 316), the innocent purchaser question in this particular case, as made by the pleadings, was a matter of practice or procedure under the Federal Equity Rules in force at the time, and was not a matter of substantive

law, Mr. Pomeroy says that the doctrine of bona fide purchaser for value "is in no respect a rule of property but a rule of inaction." (Pom. Eq. Jur., Sec. 743.) We cannot improve upon Judge Sibley's language or reasoning, in his opinion on rehearing (101 Fed. (2d) 314).

Discussion of Point Five Urged by Petitioner

(Petition for Certiorari, page 18)

The petitioner urges that the Circuit Court of Appeals has decided an important question of general law in a way untenable, in that it says the effect of the decision is to grant a reformation of a deed executed in 1899 and a lease executed and recorded more than four years prior to filing of the suit.

The suit was not one for the reformation of the deed or for reformation of the lease.

Petitioner, itself, commenced the suit as a suit to cancel a lease of Dunlap as a cloud on its asserted title. Under the Texas cases, hereinbefore cited, the real questions in the case were (1) the construction of the deed of 1899—it being ambiguous on its face and when its calls were applied to the ground inconsistencies appear; and, (2) to ascertain the real intention of the parties in making the partition of 1899.

It is not a question of reformation of an instrument at all. **Humble Oil & Refining Company v. State**, 104 S. W. (2d) 174 (179); **Beck v. Gulf Production Com-**

pany, 113 S. W. (2d) 258 (261); State v. Sullivan, 127 Tex. 525, 92 S. W. (2d) 228; Blake v. Pure Oil Company, 128 Tex. 536, 100 S. W. (2d) 1009.

Petitioner cites and relies upon Art. 5529, Vernon's Rev. Civ. Stats., 1925, of Texas, said article of the Texas statutes providing that an action to reform a deed must be brought within four years after the cause of action accrues. If petitioner relies on the Texas statute of limitation, even if it were applicable here, another Texas statute would preclude it any relief. Vernon's Rev. Civ. Stats., 1925, Art. 5540:

> "The law of limitation shall not be available in any suit unless it be specifically set forth by the party who in his answer invokes it as a defense."

The petitioner did not plead limitation in its reply to defendants' answer and cross-bill, (R. 43), and not having pleaded the Texas statute now relied upon cannot have the benefit of it.

The question of equitable laches clearly is not in the case, for, as hereinbefore shown, the true question was the construction of the deed and the ascertainment of the intention of the parties, under the well-known rules applicable both in the courts of Texas and in the Federal Courts.

Beyond doubt, the Circuit Court of Appeals has correctly decided this case, and the petition for certiorari should be denied. THEREFORE,

It is respectfully prayed that the petition for writ of certiorari be denied.

By Angus G. Wynne

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WILLIAM A. WADE,
Longview, Texas,
Of Counsel.

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1938

No.....

CITIES SERVICE OIL COMPANY, *Petitioner*

vs.

B. P. DUNLAP, ET AL., *Respondents*

OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI

Receipt of a copy of the Opposing Brief to Petition for Certiorari is hereby acknowledged, and further notice of the filing and presentation of such brief is waived.

.....

DAVID B. TRAMMELL,
Attorney for Petitioner.

APPENDIX

Appellant's surveyor Baker, in his testimony with reference to his survey and in connection with his explanation of his map, Exhibit 14 (R. 294), clearly shows the ambiguity. For the convenience of the Court, we here insert a photostat of the pertinent portions of said map, showing Baker's own explanation which shows the strip at the southeast (shaded) along the line north 12 deg. east 310 yards, as called for in the deeds of 1899 and the lease of Oct. 30, 1930, if the call for the Wiley Davis northeast corner is given effect.

Exhibit 14 does not show all the lines referred to by Baker in his testimony, but are shown on this map as made by Baker at the trial in explanation of his survey. His testimony in explanation of his survey, as applied to his "sketch" map or map made, as he said, from the calls of the deeds before he made the survey, in part is as follows: (R. 133)

"(Examination of Witness.)

By the Court:

'From the gear wheel to point E, as I have located it on the ground, the distance is 247 varas, which is about 5 varas in excess of the called distance, if I accept the gear wheel as a corner and run the called distance of 224 yards (242 varas). The distance of 278.3 varas in red on the map is not from the gear shaft to point E but is from the west line, as I have located it. The distance of 278.3 varas is greater than the called distance of 224 yards by 36 varas.'

(Cross Examination Resumed.)

By Counsel for Defendants:

'I have at your request indicated on Exhibit No. 14 a point 224 yards east of where I established the southwest corner of the Rogers tract, which point is 242 vrs. East of point I have established as the southwest corner. At your request I have run a line on the map from said point north 12 degrees east 310 yards. The next call in the partition deed to J. F. Rogers is east 154 yards. That call would go from D as marked by that line to the W. H. Rogers west line.

'From the work done on the ground, it clearly shows there is an excess distance in the north line. If a line is run west from the northeast corner of the J. F. Rogers tract, as I have located it by the iron at the fence, to the northwest corner of the J. F. Rogers 68 1/5-acre tract, as I have located it, there is an excess of about 20 varas. It is therefore evident that, by running the called distance I cannot get back to where I started.'

* * * *

'Beginning at Point B on Exhibit No. 14, the distance west, as I have located the line, is accurate with the call of the partition deed, the distance from Point A on north likewise practically corresponds and the distance on the north is accurate. The distance to Point D, running west, as I have located it, corresponds with the call of 154 yards and the distance from D to E, as I have located the line, corresponds with the called distance. All of the distances on the south line are approximately accurate with the distances in the deeds and 224

yards would approximately put the line at the gear wheel.'

• • • •

The Court:

'What you are getting at is that he admits that the signs of possession, and all the distances called for along the south border are fairly accurate, and commensurate with the calls in the instruments of conveyance, except the last call on the south line to the west?'

Counsel for Defendants:

'Yes. And if you stop at 224 yards, you will be approximately in the old fence line, won't you?

Witness:

A. No, I don't find the old fence—'

The Court:

'What you mean is that if you extend a line north from that point 224 yards west of "E" that a fence extending along that line north will be fairly commensurate with the fence line that you find up there at the north; is that right?'

Counsel for Defendants:

'That is right. The fence he says he found on the South.'

• • • •

(Cross Examination Resumed.)

By Counsel for Defendants:

'If you came over 224 yards from "E", you would be close to where the old gear wheel is there?

A. Yes.

Q. And about some distance east of the point you have marked for the southeast corner of the Empire lease?

A. Yes, of the Rogers tract.'

(Examination of Witness.)

By the Court:

'Q. Didn't you testify that you found some evidences of an old fence, not at the point that you established as the southeast corner of that 68-acre tract, not south of the bevel gear, but directly on up north and east of the line that you—

A. I showed two trees there, with wire grown into them.'

The Court:

'Q. How did that point correspond with a line extended from there along to the bevel gear that you found on the ground?

A. Those trees would be some distance west of the bevel gear.'

The Court:

'Q. How must west?

A. It would be an estimate.'

The Court:

'Q. Well, what is your estimate?

A. Probably 15 varas. That is north of the bevel gear.'

The Court:

'Q. That would leave you still approximately 20 varas east of what you have fixed as the southwest corner of the 68-acre tract?

A. Yes.'

Re-Direct Examination

By Counsel for Complainant:

* * * *

"When I started at Point D and ran the calls going the distance, I found no variance until I came to Point E. If from Point E I reversed the call and ran 224 yards west, I would not have been south of the northwest corner of the J. F. Rogers Tract No. 2, as I had located it on the ground. I would have had to go something over 30 varas further west to have been south of the northwest corner of the J. F. Rogers Tract No. 2, as I had established it. In regard to the fence running north, the map shows three trees near the southwest corner of the J. F. Rogers Tract No. 2. I am sure there were parts of a fence north of there on the east side of the road; the fence was crooked and some of it was new and I made no connection to it. I did not find any fence straight across up there and that is the reason I did not connect to it. I did not check the fence, therefore I cannot say where there was any degree of accuracy of a line fence along there. I did find evidence of a fence in the trees as indicated at the southwest corner on the map'." (R. 169.)

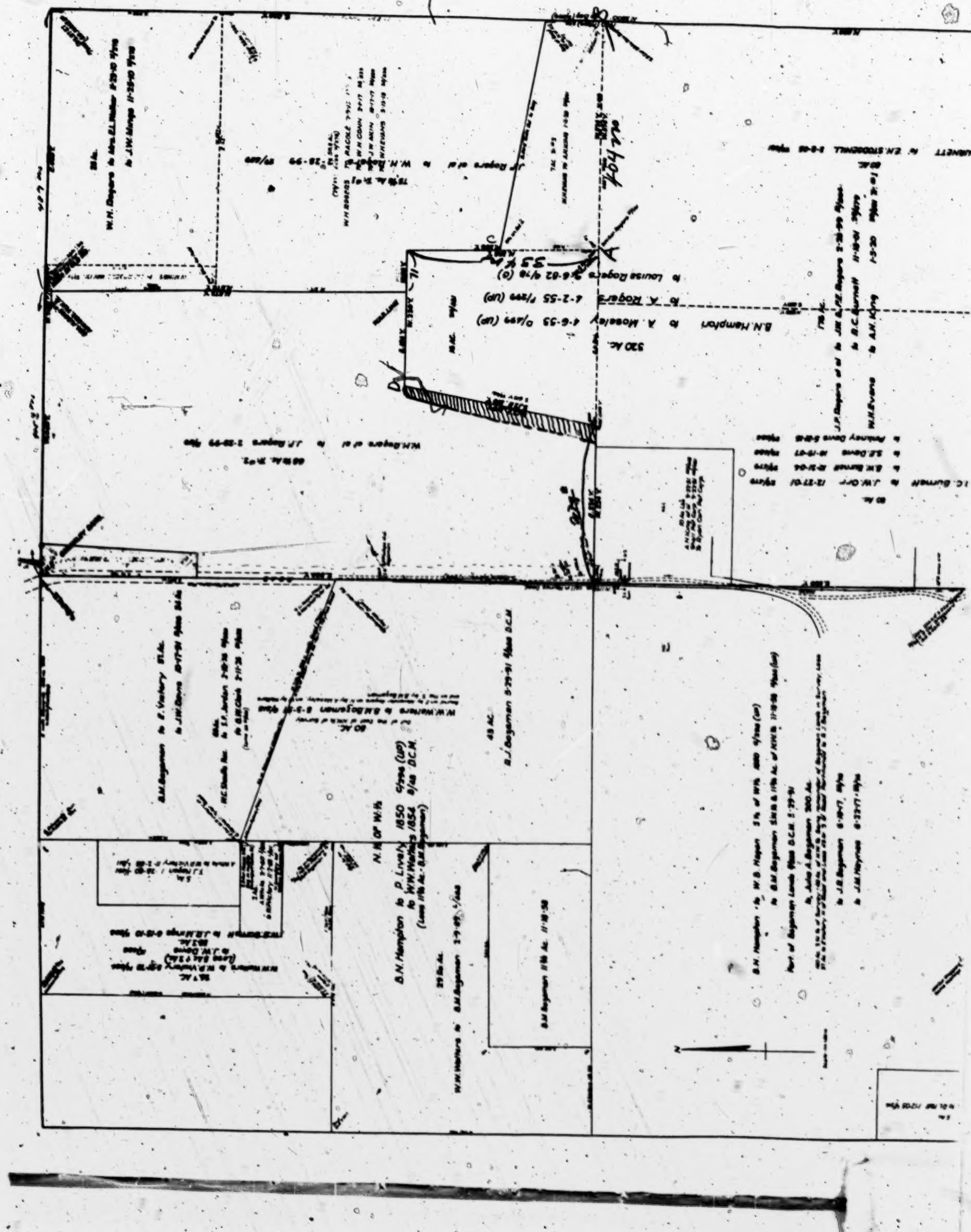
BEN COX, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination

By Counsel for Complainant:

"My name is H. Ben Cox and I live in Bartlesville, Oklahoma, and am Assistant Superintendent for the Land Department of the Empire Gas & Fuel Company. I have been there two years and before that time I was in Texas and occupied the position of District Land Man in Tyler and Houston. I was in Tyler about three years and Houston about one. I was living in East Texas in 1931. In my capacity as District Land Man I had something to do with the Empire L. J. or F. E. Rogers lease. You have handed me Exhibit No. 18, being the corrected lease from L. J. Rogers and others to the Empire. The original lease was to Chandler.

The company advised me that the description in the original lease was in error, and also excepted a two-acre tract; that the two-acre tract was not excepted by metes and bounds description and that our surveyor had surveyed the tract, which left out the two acres. That we had to secure a ratification lease, or a new lease with a description as worked out by our surveyors."



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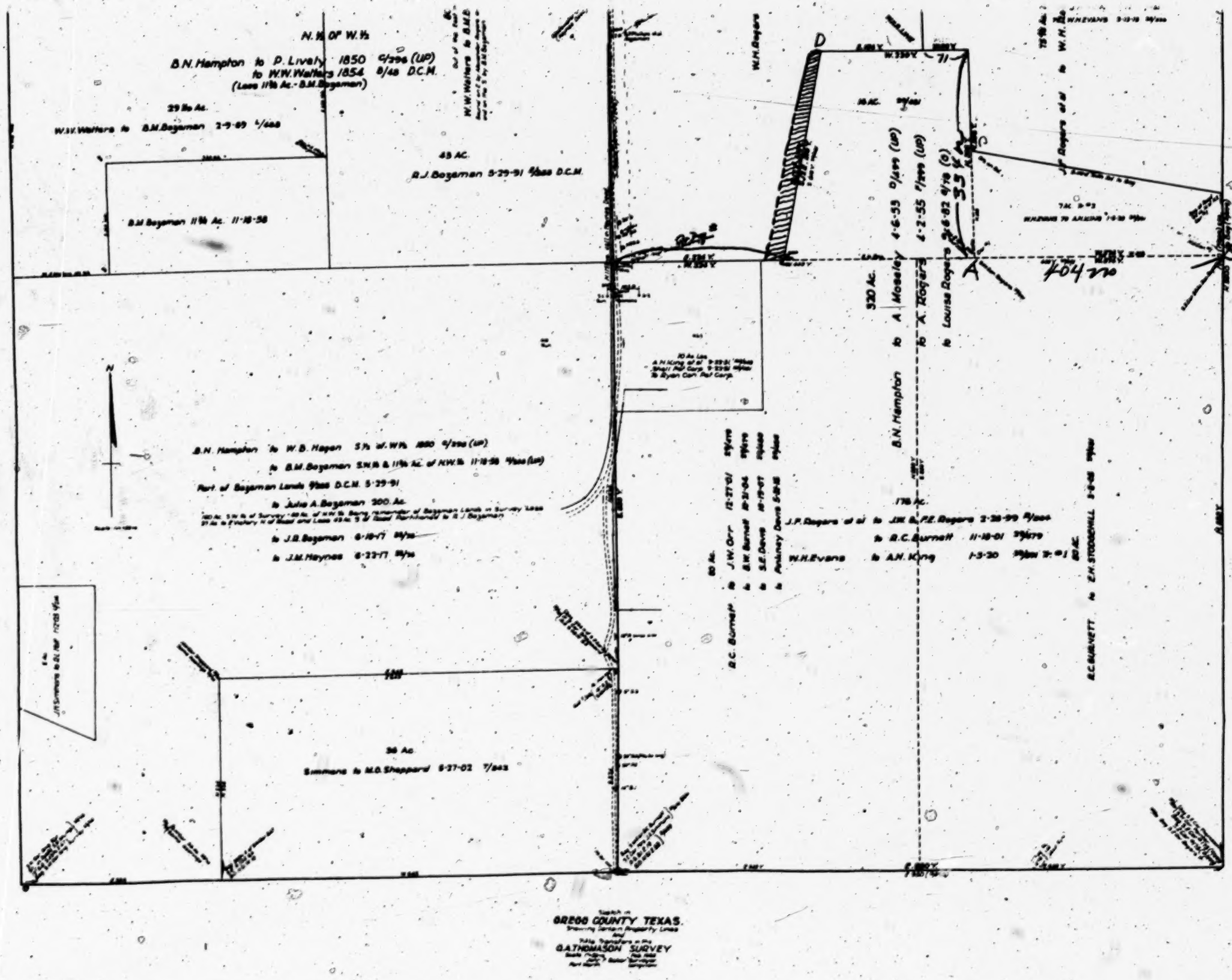

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IN THE

UNITED STATES SUPREME COURT

October Term, 1939

No. 28.

CITIES SERVICE OIL COMPANY, *Petitioner*,

vs.

B. P. DUNLAP, ET AL., *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

RESPONDENTS' BRIEF

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ther the trial court nor the Circuit Court of Appeals erred in holding parol evidence admissable to determine the intent of the partitioners and the footsteps of the surveyor, under the applicable decisions of the Supreme Court of Texas. (Responsively vital to all Propositions of Petition except Proposition I, and to all petitioner's points except Point I.)

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IN THE

UNITED STATES SUPREME COURT

October Term, 1939

No. 28

CITIES SERVICE OIL COMPANY, *Petitioner*,

vs.

B. P. DUNLAP, ET AL., *Respondents*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

RESPONDENTS' BRIEF

OPINIONS OF COURT BELOW

Original opinion rendered by the Fifth Circuit on December 8, 1938, is reported in 100 Fed. (2d) 294, and opinion on rehearing rendered on February 24, 1939, is reported in 101 Fed. (2d) 314.

SUMMARY OF RESPONDENTS' ARGUMENTS

I. That the descriptions in the instruments of petitioner's chain of title, alone and irrespective of any fact proved or unproved upon the trial, as a matter of law, under applicable Texas decisions, bar petitioner from any status of innocent purchaser or claim of legal title by reason of the call for adjoinder in question. (Responsively vital to all Propositions of Petition except Proposition I, and to all petitioner's points except Point I.)

II. The description calls in the instrument of petitioner's title being shown, both on the face of such instruments and by the evidence of record, to be ambiguous, inharmonious and irreconcilable with each other, when the call for adjoinder is observed, or when an attempt is made to apply them on the ground, and petitioner having introduced evidence on its theory of the effect of the partition, which was rebuttable, neither the trial court nor the Circuit Court of Appeals in holding parol evidence admissible to determine the intent of the partitioners and the footsteps of the surveyor, under the applicable decisions of the Supreme Court of Texas.

III. That petitioner's claim of legal title by presumption based upon an abutting road is not supported by evidentiary facts essential to such presumption and is contrary to the express findings and holdings of the courts below. (Responsively vital to all Propositions of Petition and all Points of Petitioner's brief).

IV. That petitioner has exhibited that character of bad faith in equity, both toward respondents and the court in the instant case, in a matter having immediate and necessary relation to the equity sought by it in this litigation, as would deny it remedy in a court of equity.

V. That any holding of the Circuit Court of Appeals about the procedural issue of burden of proof was not essential to the determination of the case, and any declaration by said court upon such question was therefore mere dicta. (Responsive to Propositions II, IV and V of Petition and Second and Third Points of petitioner's brief).

Respondents feel obliged to offer an explanation why its major points above stated are here set forth for the first time and were not presented in its Opposing Brief to Petition for Writ of Certiorari. Unfortunately, counsel who briefed this case for respondents was suffering a fatally impairing malady, the seriousness of which and the degree of his impairment being unknown to him and to respondents until his work on this case was done, shortly prior to his death.

STATEMENT

We regret to state that petitioner's statement of the case cannot be accepted. The opinion of the Honorable Circuit Court of Appeals presents a fair outline of the case, and respondents adopt it in this behalf.

Petitioner's case in this Honorable Court is wholly predicated upon presumptions of law, based on the one hand upon contentions of fact not supported by the record and foreclosed against it by the findings and holdings of the courts below, and, on the other hand, upon "assumptions" of fact and law of even lesser dignity.

The word "assumptions" is charitably used, because so adroitly insinuated and so boldly urged as to confuse a court unfamiliar with the record.

The presumptions of law urged by petitioner were rebuttable, and were wholly rebutted—as disclosed by the record, by the findings and conclusions of the trial court and by the opinions of the Honorable Circuit Court of Appeals.

Petitioner's "assumptions" of fact are altogether essential to the presumptions urged by it, but are founded upon no record evidence the court could consider competent or believe and certainly find no comfort in the findings and holdings of the courts below. Petitioner's "assumptions" of law are unsupported by any applicable decision of the courts of Texas, and the cases cited by it in support of its assumption of legal title to the land in controversy, in so far as at all applicable to the facts of the instant case, when fully and fairly presented do not support petitioner's contention, as we believe will be adequately disclosed under section I of respondent's brief, following.

Petitioner's major "assumption" in this Court is that it was and is the owner of the legal title to the land in controversy. When this "assumption" is shown to have no support in the record or at law, petitioner's case in this Honorable Court presents neither proposition, point or pertinence.

Since effective brevity is the sine qua non of respondents' undertaking herein, in this behalf respondents will accompany the discussion of each point urged in the summary of their argument with a statement of the relevant facts and issues of the record, in addition to their reference to and adoption of the opinion of the Honorable Circuit Court of Appeals for their statement of the case.

Petitioner introduced in evidence (R. 95 to 108, inclusive) its chain of title, including therein all of the partition deeds in question, the patent to the Thomason Survey and the deed to Louisa Rogers, the origin of the partitioned estate in question herein, and (R. 138) its original oil and gas lease—its subsequent so-called correction lease having been by the trial court held for naught and void because secured by false-representation and fraud and without consideration. (Findings of fact, par. 17, page 68; paragraphs 4 of Conclusions of Law, page 71 of Record).

I.

That the descriptions in the instruments of Petitioner's chain of title, alone and irrespective of any fact

proved or unproved upon the trial, as a matter of law, under applicable Texas decisions, bar Petitioner from any status of innocent purchaser or claim of legal title by reason of the call for adjoinder in question.

In its Amended Petition (R. 21), petitioner sets forth the origin of the description of its leasehold estate as shown by partition deed from J. W. Rogers, W. H. Rogers and F. E. Rogers to J. F. Rogers, dated February 28, 1899, as follows:

> "Situated in Gregg County, Texas, being a part of the Geo A. Thomason Survey,
>
> Starting at the N. E. Corner of Lot No. 2 which is the N. W. Corner of W. H. Rogers tract, Lot 1;
>
> Running West 440 yards to Wiley Davis N. E. corner;
>
> Thence South 880 yards;
>
> Thence East 224 yards;
>
> Thence North 310 yards at 12 deg. East of North;
>
> Thence East 154 yards to W. H. Rogers line;
>
> Thence North 572 yards to starting point, containing 68-1/3 acres, more or less."

In said Amended Petition (R. 24), petitioner states its original lease covered the above-described land, less a 2-acre tract out of the northwest corner theretofore sold by its lessors.

Further, in said Amended Petition (R. 26-27), petitioner sets forth, by metes and bounds, the description of the land in suit herein, being a tract 66.89 feet by

1883 feet lying immediately west of the west line of the land described by the distance calls in petitioner's lease and between the same and the Wiley Davis N. E. corner.

Petitioner's leasehold description above quoted, having been derived from a partition deed, not only said deed but all the deeds comprised in said partition were instruments in its chain of title.

In this action in equity to remove cloud, petitioner prays for possession, and the record does not disclose that at any time since the date of the partition aforesaid have either petitioner or its lessors been in possession of the land in controversy herein.

It is admitted in this case that the course-and-distance calls alone, in petitioner's instruments of title, do not include the land in controversy herein.

It is elemental that petitioner was and is charged with notice of the laws of Texas. Further, it is fundamental that petitioner was charged with notice of the facts revealed in its chain of title, this being the essential purpose of registration. Therefore, petitioner had notice that if the initial call in its lease and supporting deed did not reach the Wiley Davis northeast corner, such corner was west of the point called for at 440 yards.

Petitioner further had notice from such description that any distance whatsoever west of said 440-yard call would throw the west line of its description west

of its southwest corner as called for directly south of the end of said initial call. It had notice further that displacing said southwest corner westwardly would likewise displace all the other lines and corners of its lease to the extent of such westward displacement, and without exercising further presumptions of adjoinder would make it impossible by such description to reach the beginning point called for therein, as declared in the findings and holdings of the courts below. (R. 70-72, and 334).

Petitioner therefore had notice further that the aforesaid displacement in the lines and corners of its description would displace the juncture of many of its lines and corners with lines and corners of contiguous calls of the deeds to the adjoining lots in said partition, in their relation to its own partition deed description—all of which partition deeds as well as all former deeds in its chain of title were instruments of which it was required by law to take notice, as were recognized by petitioner in introducing the same at the trial, under Exhibits No. 1, (R. 95); No. 2 (R. 98); No. 3 (R. 99); No. 4 (R. 101); No. 5 (R. 103), latter being deed into Louisa Rogers, whose said estate was partitioned by the following deeds among her heirs: Exhibit No. 6 (105); No. 7 (R. 106); No. 8 (R. 108); No. 15 (R. 138); being petitioner's oil and gas lease, and many others.

In other words, petitioner had notice from its chain of title that if Wiley Davis northeast corner was not at 440 yards west from the beginning point, the call

for such corner would therefore displace all of the other corners and lines of its description, as well as disrupt the harmony, unity and junction of the contiguous lines and corners of said description with those of the adjacent partitioned lots.

Further, petitioner had notice that if, in addition to displacing the lines and corners of its own lease, such call for adjoinder likewise displaced the common corners and lines thereof with corners and lines of the contiguous lots of the partition, it thereby created or exposed areas and tracts of land not possible of inclusion, by presumption or otherwise, in either adjoining lot of the partition, and therefore that applying such call for adjoinder would create such irregularties in the partition itself, as well as the description of its lease, as would authorize the construction of its description by reversal of its calls and applying them in order from last to first, and that when this is done such adjoinder thereby was and is shown to be impossible of application on the ground and is eliminated as a matter of law, thus avoiding all the divergent inconsistencies above enumerated and harmonizing all of the distance calls of the J. F. Rogers deed, not only with each other but with all the contiguous lines and corners called for in the deeds to the other parcels or lots in said partition.

From all the foregoing facts, petitioner had and has further notice that the distance calls of its lease describe all the acreage it bought and paid for, and that any claim asserted by it to legal title to land beyond

and outside of such distance calls is unsupported by law, as being legally not in contemplation in its purchase and therefore as a matter of law wholly without consideration.

Respondents assert that under the above-stated undisputed facts the initial call in said partition deed to J. F. Rogers and in petitioner's lease, to-wit, "Running West 440 yards to Wiley Davis N. E. corner", can convey the legal title to the land in controversy to petitioner, as an innocent purchaser for value and without notice or otherwise, only if ignorance of the law of Texas as to such calls for joinder can constitute a predicate for such presumption, inasmuch as the law of Texas is thoroughly established, by abundant decisions and holdings of our Supreme Court, in cases at law that a call for adjoinder which displaces all the other lines and corners of a survey must, as a matter of law, be ignored as a mistake.

The deed and lease description in controversy reveals upon its face that carrying said initial call 66 feet beyond the called distance of 440 yards displaces the southwest corner of said survey by 66 feet; displaces the corner established by the call "East 224 yards"; displaces the corner established by the call "North 310 yards at 12 deg. East of North", and, without indulging another presumption, displaces the next call "East 154 yards to W. H. Rogers line", and displaces the beginning corner, inasmuch as without indulging a presumption it is impossible to reach the W. H. Rogers line and conse-

quently impossible to reach the beginning point, as stated in the opinion of the Honorable Circuit Court of Appeals. Further, as found by the trial court (Findings, R. bottom of page 70, and pp. 71 and 72), a strip similar to the one in controversy here would be left between the J. F. Rogers tract hereinbefore described and the tract partitioned to J. W. and F. E. Rogers, and since this strip adjoins the J. F. Rogers tract, or Lot 2, and also adjoins the J. W. and F. E. Rogers tract, being the third Lot in said partition, it would be impossible to determine by presumption to which of said lots said strip must be added as a matter of law, as insisted by petitioner must as a matter of legal presumption be done with regard to the land in controversy herein. Further, without indulging a presumption at the end of the call "East 154 yards to W. H. Rogers line" a strip of the same width as the tract in suit herein would be left between the J. F. Rogers tract, Lot 2, and the W. H. Rogers tract, Lot 1, extending the full length of the east line of the J. F. Rogers tract, which strip also must be allocated by legal presumption to said Lot 2 or to said Lot 1. Further, the strip in controversy in this suit extended all the way from the north line of the partitioned Rogers estate 320 acres to the south line thereof, and there was likewise left out of the partition a strip of land of equal dimensions to the tract in suit herein on the west of the third lot, partitioned to J. W. and F. E. Rogers, which strip must also be allocated by legal presumption.

Further, as shown by the said partition deeds in petitioner's chain of title, when the distance calls in petitioner's lease and the J. F. Rogers deed are followed and the call for adjoinder with the Wiley Davis N. E. corner is ignored, the southwest corner of the J. F. Rogers tract and of petitioner's lease is a common corner with the northwest corner of Lot 3, partitioned to J. W. and F. E. Rogers, whereas if the call for adjoinder with Wiley Davis N. E. corner is observed, these corners are absurdly displaced and separated. Further, it is significant that the description in the deed to J. W. and F. E. Rogers, beginning at the southeast corner of the partitioned original Rogers estate, arrives at a northwest corner which is identical with the southwest corner of the distance-call description of the J. F. Rogers tract, the description of which begins at the northwest corner of Lot 1, approximately in the middle of the north line of the original Rogers estate; that this corner having been marked on the ground for more than thirty years by an old pinion and gear wheel of large dimensions and for that period recognized generally in the vicinity as the original partition corner in question, (R. 335), any inquiry or investigation that might have been made by petitioner pursuant to the multitudinous evidences of ambiguity exhibited on the face of the instruments of its chain of title, would have revealed to it beyond question that its lease and deed description did not and were never intended to cover the land in controversy herein.

Therefore, from all the foregoing facts and patent implications, petitioner had notice that under the well-established law of Texas such call for adjoinder must, as a matter of law, be ignored as a mistake, as it so obviously was, on the face of the instruments in its own chain of title, of which it had notice, and controlling effect given to course and distance from known and undisputed corners of its title description.

This doctrine, so frequently reiterated of late by our Supreme Court, is not new but, as will be disclosed, is reflected in the decisions of many decades. It is not in anywise in conflict with the cases cited by petitioner in behalf of the presumption urged by it, as will clearly be manifest when the differentiating elements of petitioner's decisions are not omitted from the presentation.

A recent expression of our Supreme Court on this point is reflected by the opinion in **State v. Sullivan**, 92 S. W. (2d) 228 (233), as follows:

> "* * where the facts conclusively show that the surveyor through mistake or by conjecture called for the adjoinder, the call for adjoinder does not control over course and distance, even though the line or corner called for was marked. In such situation the call for adjoinder will be rejected, as inserted by mistake, and controlling effect given to course and distance from known and undisputed corners, when under the facts of the particular case such construction of the survey is **'most consistent with the intention to be derived from the entire description'. This method of construction by the rejection of a call for adjoinder inserted by mistake**

is most consistent with the true intention if its effect is to harmonize the other terms of the field notes and to disregard as few of the calls as possible." (Citing numerous cases.)

The description in the J. F. Rogers deed in question in the instant case being an integer or unit of a partition, the sub-quotation "the entire description" above referred to applies not only to the J. F. Rogers deed to Lot 2 in said partition, but of course to all the deeds thereof, all of which were instruments in petitioner's chain of title.

In **Humble Oil & Refining Co. v. State**, 104 S. W. (2d) 174 (179) (Tex. Civ. App.), approved by the Supreme Court (Writ refused), the Court states:

> "The adjoinder rule has no application where the facts conclusively show that the surveyor through mistake or conjecture called for the adjoinder, **and in such cases the call for adjoinder does not control the call for course and distance, even though the line or corner called for was marked.**" (Citing previous quotation from State v. Sullivan, supra) • • •
>
> "**This method of construction by the rejection of a call for adjoinder inserted by mistake is most consistent with the true intention if its effect is to harmonize the other terms of the field notes and to disregard as few of the calls as possible.**" (Citing Wilson v. Giraud and numerous other cases).

Likewise, and repetitiously monotonous, is the opinion of our Supreme Court in **Blake v. Pure Oil Co.**, 100 S. W. (2d) 1009 (1012), in which it will be noted that

even the limited quotation below reflects a surprising identity with the facts in the instant case—in fact almost what our older generation called a "hoss case":

> "• • • it is our opinion that such mistaken call should be rejected and the block constructed by course and distance from the southeast corner of the Moore Survey, located in the position where Starr and his surveyor believed it to be• • • because under the facts in evidence such construction **is most consistent with the intention to be derived from the entire description and harmonizes the other terms of the field notes.** This construction is the same in effect as a construction of block 7 by course and distance from its southeast corner on the undisputed west line of the Walling survey, the location of which southeast corner is proven by evidence hereinafter discussed. **When block 7 is thus constructed, the lengths and courses of its lines are the same as those given in the field notes and shown on Starr's map, it has the acreage called for in the deed and marked on the map, and it does not conflict with block 5, block 6, or block 8, or with the Juan Prado Survey."**

And on and on, back through the years, these metronomic utterances of our Supreme Court meter the harmony of the law of Texas with our record facts here.

We would not burden this Honorable Court with overfamilar doctrine, or naively imagine it born of us. To the end of brevity and for the edification of any who might be interested in the more recent genealogy of this expression in our State, we list below some of the cases more frequently cited in this behalf by our Supreme Court itself, in addition to those above presented:

Wilson v. Giraud (Sup Ct.) 111 Tex. 253, 264, 231 S. W. 1074, 1078;

Porter v. State (Tex. Civ. App.) 15 S. W. (2d) 191, 193;

Caswell v. Faulk (Tex. Civ. App.) 97 S. W. (2d) 341, error refused;

Finberg v. Gilbert, 104 Tex. 539, 547, 141 S. W. 82;

Gerald v. Freeman, 68 Tex. 201, 204, 4 S. W. 256;

State v. Talkington (Tex. Civ. App.) 274 S. W. 314;

Cox v. Finks (Tex. Civ. App.) 41 S. W. 95, 99;

Gilbert v. Finberg (Tex. Civ. App.) 156 S. W. 507;

Lafferty v. Stevenson (Tex. Civ. App.) 135 S. W. 216, 220.

Many of the more recent of these declarations of our Supreme Court were cited in the opinion of the Honorable Circuit Court of Appeals in behalf of the admissibility of the evidence of the survey and attendant facts, as it seems most of these cases were met with the same familiar obstruction urged here— the asserted conclusiveness of rebuttable presumptions in the face of obvious ambiguity of description. But fortuitously it seems we are not under urgent need of resorting to the confirmations the trial evidence abundantly afforded, but find ample support for our point from the inescapable purport of the chain of title introduced by petitioner.

Under the ample and authoritative decisions we have quoted and those cited thereunder, this chain of title reflects all the facts our Texas Supreme Court required, of the evidence admitted by it in its uniformly similar cases, to hold petitioner could not have been an innocent purchaser for value without notice, on its urged presumption of adjoinder. As so well indicated by these decisions, the very inharmonies, discrepancies and unresolvable presumptions thereby raised at other points in the partition descriptions enjoin the application of such presumption. Petitioner had notice of these facts from it own title and thereby is precluded here to urge its consequently unfounded claim of legal title to an estate not included in its title description, not alleged to have been represented as belonging with it and, as a matter of law, impossible of inclusion in it by presumption without wrecking the very title it here gratuitously seeks to expand and for which alone it paid value. Under its chain of title, not only was petitioner's urged presumption rebuttable. As a matter of law it was impossible of application.

But, building presumption upon presumption, in the absence of factual support, petitioner urges it is presumed partitioners intended to divide all the land in their common estate and not leave unpartitioned a strip of the dimentions in suit extending the full length of their common west line from their north line to the southernmost. Such a presumption may frequently be warranted, but in Gill v. Peterson, 126 Tex. 216, 86 S.

W. (2d) 629 (633), our Supreme Court upon opposite facts but apposite principle presents the rule applied in Texas on such presumptions:

> **"Moreover, these rules, like other rules for construction of grants and for ascertainment of boundaries, as has so often been said, are controlling only when under the facts of the particular case they best enable the Courts to arrive at the intention of the parties."**

And as said by the Honorable Circuit Court of Appeals:

> **"* * It is not unlawful to retain such a strip. If the intention to do so is clear, the contrary presumption must yield."**

The facts disclosed in petitioner's chain of title alone reveal that to indulge its urged presumptions in behalf of its thus anticipated gratuity and its generous impulse to have this Honorable Court eliminate one-half of the strip left unpartitioned, will create other strips, ambiguities and irregularities most of which no presumption can resolve, eliminate or cure, as we have hereinbefore shown.

From a consideration of the point and law here presented it will be found that the interpretation of the descriptions in the partition in question, including that of petitioner's leasehold estate, from petitioner's chain of title alone, by the rule we have announced and supported herein by abundant holdings of our Supreme Court, arrives at the identical result reached by the trial court and the Honorable Circuit Court of Appeals

from the trial evidence, inasmuch as it is not contended in this case that the course-and-distance calls in the description of petitioner's leasehold estate and supporting deed include the land in controversy herein.

Petitioner's Cases on this Point

As we have hereinbefore stated, petitioner's major "assumption" in this Court is that it was and is the owner of the **legal title** to the land in controversy. When this "assumption" is shown to have no support in the record or at law, the petition and brief of petitioner in this Honorable Court present neither proposition, point nor pertinence.

In considering petitioner's cases on this issue, it must be borne in mind petitioner is here suing for **possession** as well as title, and that the record does not disclose that at any time since the date of the partition aforesaid has either petitioner or its lessors had possession of the land in controversy herein.

On this point, petitioner cites three cases in support of its claim of legal title on the presumption of adjoinder urged by it, being the cases of Swann v. Mills, (Tex. Civ. App.) 219 S. W. 850; Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69, and Miller v. Southland Insurance Company, 68 S. W. (2d) 558 (Tex. Civ. App.). As will be noted, none of these decisions, when presented so the Court may have the benefit of the preponderantly important elements omitted from the quotations and

references set forth by petitioner, support petitioner's "assumption" and claim of legal title based thereon.

In its petition, page 35, petitioner cites Swann v. Mills and quotes as follows from the decision:.

> "It will be observed that in both deeds—that from Ingraham to Bellamy and from Bellamy to Mills—the west boundary line of the Neil survey is called for, and is the first call mentioned, as the west boundary line of the land conveyed. Neither of those deeds calls for any objects, natural or artificial, which conflict with the true Neil line as originally established. * * *"

By the asterisks here inserted, petitioner omits the following rather pertinent language:

> "We then have field notes in which **there is neither a patent or a latent ambiguity as to that boundary.** If we rely upon the language which the parties incorporated in the written conveyances introduced in evidence, **and which are not attacked as incorrect,** Bellamy and Mills both purchased to the true Neil west boundary line. The rule is well settled that in such cases the written description controls.
>
> "In the case of Johnson v. Archibald, 78 Tex. 96, 14 S. W. 266, 22 Am. St. Rep. 27, Justice Gaines used this language:
>
> > 'If **the calls in a grant,** when applied to the land, **correspond with each other,** parol evidence is not admissible to vary them by showing that in point of fact they were not the calls of the survey as actually made. **But if, when so applied, they disclose a latent ambiguity—that is to say, they conflict with each**

> other—then extrinsic evidence may be resorted to in order to determine the conflict and to show the land actually intended to be embraced by the calls of the survey.'
>
> "The same proposition is announced in the following cases: Brodbent v. Carper, 100 S. W. 183; Anderson v. Stamps, 19 Tex. 465; Williams v. Winslow, 84 Tex. 371, 19 S. W. 513; Thompson v. Landon, 87 Tex. 254, 28 S. W. 931; Jamison v. N. Y. & L. T. Co., 77 S. W. 969; Watts v. Howard, 77 Tex. 71, 13 S. W. 966; Robertson v. Mosson, 26 Tex. 248.
>
> "It may be that in a contest between Ingraham and Bellamy, or one claiming under Bellamy with notice, Ingraham would, upon a proper showing, have a right to restrict the purchaser to the line surveyed by Pogue. **But in order to do so he would be required to allege and prove a mistake in the field notes of his deed.**" (Emphasis ours).

Here petitioner resumes his quotation of this opinion, as follows:

> **"Whether Ingraham intended to do so or not, he executed a deed which conveyed to the true west boundary line of the Neil survey, and thereby invested his grantee with the legal title to all he described. Whatever interest remained in him by reason of a mistake in thus describing the land was an equity, of which there was no written record. One purchasing from Ingraham's grantee without notice of that equity would acquire title to all the land described in the deed."** (p. 852).

It must further be noted that the line in dispute in the above case was the west boundary line of the Neill

Survey, which was the "beginning call" in both deeds involving the descriptions in question in the Mills title, and therefore, as stated by the Court in the portion of the opinion omitted from quotation by petitioner, **no patent or latent ambiguity was in question** (219 S. W. 851), and, further, that **Mills was in possession,** suing Swann for trespass and for $50.00 damages because of Swann "cutting and destroying a wire fence" erected by Mills, as well as other damages. (219 S. W. 851).

We submit that in omitting the portion we have been obliged to supply to manifest the true holding of the court in Swann v. Mills, petitioner in the instant case has presented as the law of Texas a holding exactly reverse in substance and effect to the plain and patent intent of the court in the distinction it so carefully made in its opinion. The part of the opinion so withheld from the Court here was all that was needed to exhibit the consistent uniformity of our courts in this behalf. So revered was Justice Gaines of our Supreme Court that both courts and counsel prized his decisions as much for the name they bore as for their authority and dependable substance, and it is to us understandable that when the Honorable Justice in Swann v. Mills was obliged to write an opinion which might be interpreted to hold other than the eminent Gaines, he was careful to distinguish the facts in the language of Justice Gaines himself.

Thus, when the full facts of petitioner's cited cases are presented, as we have set them forth above, it is

seen how the stone which the builder rejected has indeed become the head of the corner.

And that is the kind of emasculated authority upon which petitioner has founded its "assumption" of legal title, by which it seeks in this Honorable Court to throw the burden of its case upon respondents, and upon which it predicates error of the Honorable Circuit Court of Appeals in a monumental structure of sound and authoritative cases—but wholly inapplicable to the instant case.

We will now see how much legal title petitioner derives from Garrison v. Crowell. We apprehensively note it does not purport to quote from the short and substantial opinion of Justice Gaines in this case, but on page 38 of the petition presents an outline of the case as follows:

> "The early case of Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69, is therefore directly in point. There appellant and one John H. Stephens were claiming adversely a tract of land in Montague County, Texas. They compromised their claims, in pursurance of which appellant conveyed to Stephens a portion of the tract."

At this point we are moved to consult the opinion of Justice Gaines and find a significant omission wherein we observe the Court did not fail to note:

> "Sometime after the conveyance, Stephens moved his fence upon the more Southern line, and took actual possession of the disputed land."

We may now trust petitioner's narration a little further:

> "Stephens subsequently sold the land to the defendant Crowell. Appellant sued Crowell claiming that they were mistaken in supposing that the southwest corner of the land was in the line of the Davis Survey for which his deed to Stephens called, and that the call of south 889 varas to the southeast corner of the Hodges survey on the north boundary line of the Davis Survey did not reach the Davis Survey by some 79 varas, and that the 79 varas were not covered and included by the deed. This is similar to the case at bar, the call west 440 yards not reaching the Wiley Davis northeast corner by approximately 66 feet. There, as here, the strip between the called distance and the adjoinder called for was the land in controversy. Our Supreme Court held that such mistake would not avail appellant as against Crowell, an innocent purchaser."

And so ends petitioner's narrative of the case; but again it appears we cannot safely ignore these further unmentioned comments of Justice Gaines:

> "If it be determined that Crowell is a bona fide purchaser **without notice**, of the land in question, the judgment must be affirmed, without reference to any other question presented by this appeal; and we have no doubt that he must be so held. It does not appear that he knew that the distance of the west line called for in the deed would not reach the Hodges corner and the Davis line. Therefore **there was nothing on the face of the conveyance to put him upon inquiry as to any claim upon part of appellant. He found Stephens in possession**

> **of the premises in controversy, holding under a duly recorded deed from appellant himself, which, according to well established rules of construction, embraced the land so possessed. He paid his money upon the faith of a conveyance which imported an absolute title in his vendor at least against appellant in this case, and we fail to see any reason why he should be excepted from the rule which protects the innocent purchaser for value against the claim of his adversary, which was unknown to him at the time of his purchase."**

From the record in the instant case, it does not appear that petitioner's lessors were in possession under a deed calling for the line under fence, or in fact that they ever had any character of possession of the unfenced land in controversy in this case. To instance that the fact of possession was held by Justice Gaines to be the critical distinction in the case of Garrison v. Crowell, we find he goes on further to differentiate Garrison's cited authority of Houston v. Sneed, 15 Tex. 307, as follows:

> **"The case of Houston v. Sneed, 15 Tex. 307, cited by appellant's counsel, does not sustain the proposition submitted by them upon this point. In that case Sneed was held not to be an innocent purchaser, because at the time of his conveyance Houston was in actual possession of the land up to the disputed line. This was considered as constructive notice to him of Houston's claim.** But the court says: 'Had there been no settlement up to this agreed line, and no notice to him of it, he might have insisted upon the line originally established between Horton and McKinney, called for by his

deed.' It is evident that, in so far as the opinion bears upon this case, the authority is against appellant, and not in his favor."

Thus, when the facts presented in this opinion are adequately set forth we find that defendant Crowell bought from Stephens who was in possession of the land up to the disputed line under a deed from plaintiff, Garrison, calling for such disputed line. Under this state of facts, the courts of Texas appear to have uniformly supported the presumption of the legal title following such possession. This certainly is no parallel to the instant case, and cannot be considered in relation thereto.

Petitioner's third case in behalf of its asserted legal title, that of Miller v. Southland Insurance Company, 68 S. W. (2d) 558, when the opinion is consulted, reveals the same state of facts set forth above in Garrison v. Crowell, which it cited. In the Miller case, the court says:

"M. K. Miller, the borrower, was in possession of the entire lot from the railway south to the south boundary line. Miller had constructed buildings along the whole of the west line of the property. Appellant's representatives inspected the property and there was nothing in its physical aspect or in its occupancy which could have put the Insurance Company upon notice of any claim adverse to M. K. Miller. Under these circumstances and the authority of the case cited, we hold the insurance company, as a bona fide lienholder without notice, is protected against the adverse claim of title of appellants arising out of the boundary dispute."

The foregoing three cases are the only cases cited in the petition or petitioner's brief as supporting its claim and "assumption" the legal title. The only Supreme Court case cited by it, that of Garrison v. Crowell, when the part omitted in petitioner's quotation therefrom is supplied, is clearly against its contention of legal title. The other two cases, both from our intermediate Courts of Civil Appeals, are wholly inapplicable to the facts of the instant case. It does seem, if there were any foundation in the law of Texas for petitioner's claim of legal title, out of the multitudious cases we find bearing upon the facts presented here it ought to be able to find some supporting authority. But all the pertinent cases we have been able to find clearly hold against petitioner's contention.

In filing its suit in equity, petitioner in the beginning assumed it had the legal title, and without support of any applicable case or even supporting evidence adduced at the trial, it has built all the unwarranted presumptions and issues that plague this appeal, utterly without legal or factual basis.

These respondents, as defendants in the trial court, in their answer moved to dismiss the bill as without equity in that complainant had not in any manner established its legal title, had never been in possession of the property, and as a matter of fact in its bill in equity prayed for both title and possession. All that petitioner has ever presented in behalf of its "assumption" of legal title is its reliance upon a call for joinder

which, under the facts presented by this case and even from those of petitioner's chain of title alone, is uniformly rejected by our Supreme Court as hereinbefore shown; and all of said cases and multitudes more hold that under the facts presented here, respondents have always had and still hold the legal title to the land in controversy, as found and held by both the courts below.

II.

The description calls in the instruments of petitioner's title being shown, both on the face of such instruments and by the evidence of record, to be ambiguous, inharmonious and irreconcilable with each other, when the call for adjoinder is observed, or when an attempt is made to apply them on the ground, and petitioner having introduced evidence on its theory of the effect of the partition, which was rebuttable, neither the trial court nor the Circuit Court of Appeals erred in holding parol evidence admissible to determine the intent of the partitioners and the footsteps of the surveyor, under the applicable decisions of the Supreme Court of Texas.

The trial court, in its Finding No. 19 (R. 69) stated:

> "The Court finds as a fact that the surveyors of the Complainant testified that there was an ambiguity in the partition deed and in the lease of the Complainant when it was attempted to be applied to the ground, and, upon such admission of ambiguity, the Court heard evidence as to the

footsteps of the original survey at the time of the partition and as to the intent of the parties in making such instruments.

And in its Conclusion No. 4 (R. 70-71), the Court states:

"The Court concludes that extrinsic evidence was admissible to show that the surveyor Simmons, at the time he made the partition survey, placed a stake at a point 880 yards west of the northeast corner of the said Thomason Survey for the northwest corner of the J. F. Rogers tract, and another stake 880 yards south thereof at a point now, and for more than 30 years, located by the old gear wheel. Also, extrinsic evidence was admissible to prove that one of the stakes was removed and the gear-shaft placed where said stake was originally driven, as the Court concludes that the correction lease obtained either does not cover the 66 feet involved in this controversy or it takes in more land than it was represented to cover at the time it was obtained.

The correction lease and the original lease, separately and taken together, when application of the calls is made to the land on the ground, create an ambiguity and, when taken in connection with the description of the partition deed to J. F. Rogers, create an ambiguity. If effect is given to the call "thence west 440 yards to the northeast corner of the Wiley Davis tract; thence south 880 yards; thence east 224 yards; thence north 310 yards at 12 deg. E. of north; thence East 154 yards to W. H. Rogers line; thence North to the beginning, it would leave out a strip of land 68 feet wide west of the J. F. Rogers old fence, along the

line North 310 yards at 12 deg. E. of North; for, if you run from the southeast point, as claimed by the complainant herein, at a point 880 yards south of the northeast corner of the Wiley Davis tract of land, and then run East 224 yards (the call in the original partition deed and in the original lease to W. P. Chandler and in the assignment from Chandler to the complainant), there will be 68 feet between J. F. Rogers' fence and the call distance; then to run north 310 yards at 12 deg. east of north, there will be 68 feet between the line as called for and as surveyed and the fence line of the Rogers tract of land. This ambiguity, from all the facts, compels the conclusion that the intention of the parties was not to take in the 68 feet west of the gear wheel in controversy, and that it was purposely left out of the partitioned land. * * * In other words, if the complainant were entitled to rely on the call to the Wiley Davis corner, at the north, it would be confined to the call of 224 yards east from the point 880 yards south of the said corner, and a strip of 68 feet would be outside the calls of their lease along the east side thereof."

And the Circuit Court of Appeals, in its original opinion, in reviewing the evidence presented to it said: (R. 333-334)

"On the other hand, if the north line of Lot No. 2 is not stopped at 440 yards but is continued about 66 feet to Wiley Davis' N. E. corner, which was a known point in 1899 and ever since, and if the survey is continued thence, the beveled gear shaft will be missed at the southwest corner by 66 feet, the west lines of Lot. No. 1 will not be reached by that distance, nor will the beginning point be."

That such ambiguity completely overcomes any presumption of innocent purchaser on call for adjoinder, as urged by petitioner, as well as any legal title predicated upon such call for adjoinder, is shown by Justice Gaines in the case of **Johnson v. Archibald**, 78 Tex. 96, 14 S. W. 266, 22 Am. St. Rep. 27, (1890) in his Texas Supreme Court opinion quoted in petitioner's cited authority to the contrary, Swann v. Mills, in differentiation therefrom. Justice Gaines said:

> "If the calls in a grant when applied to the land correspond with each other, parol evidence is not admissible to vary them, by showing that in point of fact they are not the calls of the survey as actually made. **But if when so applied they disclose a latent ambiguity—that is to say, if they conflict with each other—then extrinsic evidence may be resorted to in order to determine the conflict and to show the land actually intended to be embraced by the calls of the survey.**"

That the Court in petitioner's case of Swann v. Mills considered this the law as applied to the facts of the instant case is thoroughly evidenced by his quotation of the above in differentiating the facts in the Swann case, at the point in the opinion where petitioner omitted it.

It will be seen the Court in petitioner's case of Swann v. Mills went on further to differentiate the facts before it from those of the Supreme Court case referred to by it above. In further language omitted in petitioner's quotation the Court emphasized:

"We then have field notes in which there is neither a patent or a latent ambiguity as to that boundary* * * and which are not attacked as incorrect."

Thus there can be no doubt, by reason of its careful differentiation, the Court in Swann v. Mills considered the law applicable to the facts of the instant case as we have presented it. The character of description conveying an unassailable legal title, against which evidence cannot be introduced to prove the actual survey, is exactly that character of description Swann v. Mills passed upon— a description without ambiguity or uncertainty, either patent or latent, "not attacked as incorrect", the calls of which, whether or not following the footsteps of the surveyor, delineated with certainty a definite tract of land about the location of which upon the ground there was absolutely no question.

In **Wilson v. Giraud**, 111 Tex. 253, 231 S. W. 1074 (1078), (Supreme Court), cited by the Circuit Court of Appeals in its original opinion in this behalf, the same rule is held forth:

"Once testimony is adduced to establish an inconsistency in field notes, parol evidence which throws light upon which call is true and which call is false is admissible. The purpose of admitting the parol evidence is not to override that which is written, but to properly interpret it. Where it is impossible to give effect to all that is written, effect will be given to that which may be found to be true."

Likewise, in Blake v. Pure Oil Company, 100 S. W. (2d) 1009, (1012), (Tex. Com. App.)—

> "A call for an adjoinder is ordinarily given controlling effect over a call for course and distance, but when it is proven that the call for adjoinder was made by conjecture or under a mistaken belief as to the location of the adjoinder, such call does not control over course and distance. In such situation the call for adjoinder will be rejected as inserted by mistake, and controlling effect given to course and distance from known or undisputed corners, when under the facts of the particular case such construction of a survey is most consistent with the intention to be derived from the entire description.
>
> * * * * *
>
> "But parol evidence is admissible to show where on the ground a survey or a line of a survey was actually made, when the calls in the field notes or deed are conflicting or ambiguous, or when the effort to apply the description to the ground gives rise to ambiguity. * * * The description in the deed conveying Block 7 is not on its face ambiguous, but as has been shown serious conflicts and irreconcilable ambiguities arise when effort is made to apply the description to the ground."

We see no virtue in multiplying uniformities, but to the same effect are the decisions in the cases listed below, many of which were cited on this point by the Honorable Circuit Court of Appeals, and some of which were quoted by us in connection with our Point I:

State v. Sullivan, 127 Tex. 525, 92 S. W. (2d) 228;

Humble Oil & Refining Co. v. State, 104 S. W. (2d) 174 (179) (Tex. Civ. App.—Writ refused);

Gill v. Peterson, 126 Tex. 216, 86 S. W. (2d) 629;

Caswell v. Foulk, 97 S. W. (2d) 341 (W. E. refused);

Porter v. State, 15 S. W. (2d) 191 (193) Tex. Civ. App.);

Milton v. Campbell, 171 S. W. 251, (Tex. Civ. App.).

The only cases presented by petitioner upon this point were Swann v. Mills, Garrison v. Crowell and Miller v. Southland, discussed and differentiated by respondents in the latter portion of their Point I, pages 19 to 28, this brief, and they are there shown, when fully quoted, to be wholly inapplicable to the facts of the instant case. We have been unable to find any case supporting the rule urged by petitioner from their misstatement of these cases. If they ever were the law of this State on this point, which we deny, it is certain that the numerous cases of our Supreme Court itself, recently decided, as above quoted and referred to, effectually relegate them to the realm of abandoned doctrine. But it does appear that, as presented, they mislead the Honorable Circuit Court of Appeals, who apparently accepted them as submitted by petitioner; nevertheless said Court cited abundant and more recent authority of our Supreme Court to the contrary. As we have before repeated, without these cases petitioner's brief and petition are without proposition, point or pert-

inence—it simply has presented no case for consideration here.

If the courts below both hold that under all the facts presented before them the surveyor in making such partition deliberately, upon request of the partitioners, left out of the partition a strip 66 feet wide along the full length of the west line of the partitioned land, and in witness of such fact drove a stake marking the southwest corner of petitioner's leasehold, the said Lot Two, and the northwest corner of Lot Three, and that some few years thereafter said stake was replaced by a large pinion shaft and gear wheel which has marked such corner for over thirty years as the reputed division point between said Lots Two and Three and between both of them and the land in controversy herein, we cannot understand, if the evidence supporting such findings and holdings was admissible (and we have shown it was), how contrary allegations can stand before this Honorable Court as the sole support of legal propositions which thus can have no bearing upon this case.

The old pinion and gear-wheel so often mentioned in the record, findings and decisions in this case was located in the center of the west line of the partitioned land. That the stake replaced by it was located as the result of a meticulously careful survey is disclosed by the testimony regarding the work, over thirty years later, of two modern surveyors, who with modern precision instruments measured from an agreed division

point in the center of the east line of said partitioned land to the old pinion and gear wheel. Surveyor Boyette reached the pinion and gear wheel in exactly 880 yards. (R. 237). Surveyor Hackney reached it within "one-hundredth of a yard"—less than a third of an inch. (R. 231). Could such a marker be there as the result of accident or chance and have remained undisputed and generally recognized in the vicinity as marking such corners for more than thirty years?

Thus respondents have shown that, on the ambiguities indicated, the trial court followed the established law of Texas with regard to the admission of the evidence protested by petitioner here, and that the evidence so adduced, as found and held by both courts below, and their decisions predicated thereupon, reflect the identical result arrived at from petitioner's chain of title alone, considered in the light of the law of Texas as presented under our Point I.

Yet, despite the exhibited *fata morgana* of petitioner's legal title, we have yet to argue that we did not have to prove petitioner, astride this tenuous delusion, is not and was not an innocent purchaser for value of this land it obviously did not lease, if for no other reason than the fact its lessors have never owned it.

Many of the petitioner's propositions involving the issues and evidence concerning the survey in question cannot properly be considered or discussed separately with adequate comprehension of their full implications. Individually, they present perhaps grounds for argu-

ment, but considered jointly they destroy themselves, as disclosed by the anomalous absurdity evolved when they are considered together. Petitioner urges upon this Court:

1. That the call for adjoinder in question, irrespective of any other fact or notice revealed in its chain of title or otherwise, constituted it the owner of the **legal title** to the land in controversy;

2. That because it had pleaded this asserted legal title, under the law the burden of proof was upon respondents to disprove the same—

but

3. That as a matter of law respondents could not introduce any evidence to disprove petitioner's evidentially unsupported and hence unestablished plea.

If these propositions can be sustained in this Honorable Court, all that could hereafter be required of a complainant in a Federal Court in this character of boundary suit is to plead his asserted, even though unfounded, legal title and rest his case.

Petitioner introduced abundant evidence in an effort to prove its theory of the survey and the intent of the partitioners, as disclosed thereby, but in this court, in a suit in equity, asserts that as a matter of law respondents are not permitted to present any evidence in rebuttal as to the original survey as actually made.

If this is law, respondents feel a greater urge for equity than when they pleaded petitioner had an adequate remedy at law. In fact, they feel the need of ecclesiastic relief.

III.

That petitioner's claim of legal title by presumption based upon an abutting road is not supported by evidentiary facts essential to such presumption and is contrary to the express findings and holdings of the Courts below. (Responsively vital to all Propositions of Petition and all Points of Petitioner's Brief).

The facts and law applicable thereto, including quoted findings, conclusions and decisions of the courts below, comprised in the foregoing points of respondents brief, all are important to a consideration of the above-stated Point III, and are adopted as a part of and in connection therewith.

In addition thereto, they quote as follows from paragraph 7 of the Findings of Fact (R. 63):

> "In making a survey on the ground for tract No. 2 J. H. Simmons began on the north line of the Thomason Survey at a point 440 yards west of the northeast corner of said survey, being at the point he had determined as the northwest corner of tract No. 1, and ran a line west along the north line of said Thomason Survey a distance of 440 yards and there set a stake for the northwest corner of Lot No. 2, and told the four Rogers boys, who were accompanying him on the survey, that there was

a chain left between the point where he had stopped and set the stake, after measuring 880 yards from the northwest corner of said Thomason Survey and the northwest corner of their land, after measuring 880 yards from the northeast corner of the survey it was about one chain (66 feet) to the northwest corner of their land, which corner, from a fair inference from the evidence, was the northeast corner of the Wiley Davis land, though the surveyor Simmons did not mention the Davis corner to the Rogers boys at the time of the survey; neither did he survey to said corner; nor did he endeavor to locate said corner at the time he was making the partition for the Rogers boys. The four Rogers boys, viz., W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers, who were with said J. H. Simmons, informed him that they would leave the 66 feet out of the partition and use the same jointly and keep it like it was; the same 66 foot tract was then being used IN PART as a logging road." (Capitals ours.)

* * *

"After J. H. Simmons set the stake for the northwest corner of the Thomason survey, he measured south a distance of 880 yards and there set a stake, at a point now evidenced by the old gear wheel, placed there soon thereafter as a corner stake, where it has remained for more than thirty years."

* * *

And from paragraph 14 of said Findings (R. 67), Respondents quote:

"The Court finds that J. F. Rogers never acquired title under the partition deed executed February 28, 1899, to the strip of land situated between

a line run south from the Wiley Davis northeast corner and a line run south from a point 880 yards west of the northeast corner of the Thomason survey to the gear shaft. The Court finds that J. F. Rogers never acquired title under said deed to said strip, but that all land lying between a line run south from the Wiley Davis northeast corner and a line run south from a point 880 yards west of the northeast corner of said Thomason survey was not covered by said deed. When Mrs. L. J. Rogers and her two children made, executed and delivered to W. P. Chandler, on October 20, 1930, the oil and gas lease under which complainant claims title to the strip, said Mrs. L. J. Rogers and her children did not own the fee simple title to all of said strip of land, but said fee simple title was then owned by the said heirs of Louisa Rogers, deceased."

And from paragraph 15 of said Findings (R. 67-68), as follows:

"The Court finds that the oil, gas and mineral lease and leasehold estate of Complainant, Empire Oil & Refining Company, originally executed in favor of W. P. Chandler, dated November 18, 1930, does not cover nor include any land west of a line running north from the old bevel gear and said oil and gas lease does not cover and include the 66 foot strip situated between the line running south from the Wiley Davis northeast corner wherever situated, and a line running south from a point on the north line of the Thomason Survey 880 yards west of the northeast corner to the gear shaft, and that the West line of plaintiff's lease coincides with the East line of the Dunlap lease."

The trial court did not find or conclude anything with regard to the road in question, merely reciting that under the agreement of the heirs to leave said strip unpartitioned, as adduced in the evidence and findings derived therefrom, hereinabove quoted, and as clearly manifest in the instruments of partition themselves, the said J. F. Rogers and his heirs, lessors of petitioner, never did own the title to the land in controversy, and consequently holding they could not have leased it to petitioner, either by intent or authorized presumption.

The trial court's finding that the Rogers heirs, during the survey for the partition, told the surveyor **"they would leave the 66 feet out of the partition an use the same jointly and keep it like it was; the same 66 foot tract was then being used in part as a logging road"** will be fortified and elucidated hereinafter from the testimony of the most competent witnesses, many of them for petitioner, showing that the words **"in part"** referred to the fact that if any of said road whatsoever was upon the strip of land in controversy herein, there could not have been more than five feet of the strip included in such road, and that on the extreme western edge thereof, farthest removed from petitioner's lease. These witnesses were those who helped cut out the road in question, and most of whom testified the road was altogether upon the land of Wiley Davis, which, upon the presumption urged by petitioner would leave the title thereto entirely in Wiley Davis. Certainly there was no evidence in the record of any road abut-

ting or margining petitioner's lease at the time of the partition."

The Circuit Court of Appeals, reviewing the facts from the evidence presented to it, states (R. 334-335):

> "The court properly heard the testimony of persons who were present at the survey, and it clearly showed that the northwest corner of Lot No. 2 was deliberately and purposely put about a chain's length east of the Wiley Davis corner so as to leave a strip undivided and under the control of all four tenants in common **for the purpose of a road.**" (Emphasis ours).

On page 22 of its brief, petitioner avidly grasps the slight misquotation of the trial court's finding at the end of the above-quoted paragraph, and proceeds to make therefrom an air-tight case of presumptive conveyance by reason of an abutting road, but we believe the paragraph, taken as a whole, even granting the misstatement of the finding as correct, would merely reflect an agreement of the heirs to retain common ownership of the land in controversy, whether or not it was intended to be used as a road, and J. F. Rogers being a party to such stated agreement and such agreement being evidenced by the instruments of partition as a whole, by the large pinion and gear-wheel separating the partitioned land from that left unpartitioned, which, as the evidence amply discloses replaced the stake set by the Surveyor at the time of the survey and agreement in question, and the further fact that J. F. Rogers and his heirs have never claimed indepen-

dent ownership of such undivided tract all serve to emphasize the common ownership of the land in controversy by the heirs of Louisa Rogers, and that the same was not thereby, by presumption or otherwise, conveyed to J. F. Rogers, and that, as held by both courts below, neither J. F. Rogers nor his heirs have ever owned the same exclusively as their own fee-simple estate.

Quoting from the original opinion of the Circuit Court of Appeals further, we find, (R. 336):

> "Appellant strongly argues that although it be established that the call for the Wiley Davis corner does not belong in the deed, under settled rules of law the conveying of the land adjoining a road will carry the grantor's title to the servient fee up to the center of the road, and if the grantor has no land beyond the road, the grantor's title to its further edge will pass. Such is the general rule applied both to highways and streets and alleys, non-navigable streams and railroad rights-of-way. 8 Am. Jur., Boundaries, Secs. 36, 39, 22, 25; 11 C. J. S., Boundaries, Secs. 31, 35, 45. It is based on the presumed intention of the parties that the grantor would not reserve a long, narrow strip under such way or stream for which he had no use, and partly on public policy in that such strips are likely to give rise to litigation in the distant future. **But it is not unlawful to retain such a strip. If the intention to do so is clear, the contrary presumption must yield. And if the conveyance as made does not reach the highway or stream, it cannot be extended to it to avoid creating a separately owned strip. There was in 1899 no highway or street or alley covering the strip in question. A**

highway ran east and west through the land to be partitioned near its center. The Rogers brothers had run a sawmill on their land, and had hauled logs along the line of Davis to this highway. It was not a publicly worked way, or an established road. About this time, the date not being clearly fixed, Davis wished to confine the travel across his place, and he testified he gave fifteen feet along the east edge of his land for a north and south road. Several witnesses say they helped cut the road out fifteen or twenty feet wide, cutting the line trees on the Davis line because they were in the road."

* * *

"The land, as we understand, was mostly in woods. The actual road was thus only twenty feet wide, and supposed to be half on the land of Davis. Assuming it to have been in existence in 1899, the northwest and southwest corners which the surveyor fixed for Lot No. 2 were about sixty-six feet from the center of this road and fifty-six feet from its margin. Neither the deed nor the field notes say anything about a road. This is not a case in which the boundary fixed is in fact the edge of a road either public or private."

(Here the Court correctly quotes the trial Court's finding, as follows:)

"The only thing that tends to make the strip in contest a road, or the equivalent of a road, is the parol evidence that the Rogers brothers during the survey informed the surveyor, as found by the court, that "they would leave the 66 feet out of the partition and use the same jointly, and keep it like it was; the same 66 foot tract was then being used IN PART as a logging road". (The court em-

phasized "in part".) "There was no conveyance to dedicate the strip to the public as a road. It was subjected to no easement over the whole of it so as to convey the whole strip into a roadway. There is a plainly expressed intention not to add the strip to Lot No. 2 but to retain joint control and ownership of it. Since the deed as prepared said nothing about a road as a boundary, there was no occasion to make a reservation of the land, though to some extent on its far edge it was used for a road. The case presented is not one requiring an extension of the deed beyond its true calls."

The testimony of those acquainted with the land in controversy at the time of the partition is stated in narrative below, with page references to the Record:

Wiley Davis, petitioner's witness, owner of the land lying immediately west of the land in controversy, with regard to the road in question, in so far as it abutted his property stated that prior to the road he cut out himself "There was no road there (R. top page 201); that he constructed the road in question, setting his fence back from his corner 15 feet, and (R. 202) there was no road there until he cut it out himself. And (R. 201), when he fenced his land the pine bearing tree marking his northwest corner stood outside the road he built, on the northeast side of the road, and (R. 202) his northwest corner was northeast of the tree (R. 198) seven varas, as shown by his deed—placing all the road at that time on the land of Wiley Davis. And (201), the pine knot driven for Wiley Davis' northeast corner "was out from that pine tree a little east of north."

The witness Wiley Davis, now over 80 years of age, parted with his title to the land off which he cut the road a very few years after cutting out the road, and at the time of the trial had no interest in claiming the roadway in connection with the land he had long ago parted with.

F. E. Rogers testified (R. 225) "When they cut the road up there the road came **almost to the pine tree, I guess.** "I did not help cut the road out to the school" (on northwest corner of Wiley Davis land) "but I hired some men to work from a certain point. **Wiley Davis cut from here to where he had his fence.** And, (R. 226), "If the road that Davis and I and the others had cut out had gone on straight north to the north line of the Thomason Survey and continued on North it might have run over the pine tree. **The pine tree was about seven feet from where the pine knot represented the corner.**"

J. E. Sport (R. 237)—had known the land since 1892; confirms road as being between school-house (on Wiley Davis land) and the pine tree witnessing pine knot marking center of survey seven feet northeast of the pine, said center-point being the boundary between the land of the Rogers heirs, the east-half of the Thomason Survey, and the western half. (R. 239) Sport helped put the road there.

The evidence of petitioner's engineers and other witnesses who became familiar with the land twenty-five or thirty years after the partition is not very com-

petent as to what they found on the ground so long afterward, but petitioner's engineer, Baker, witness for petitioner, (R. 124-125) placed the east edge of the road not as adjoining petitioner's leasehold, but 57½ feet west thereof. This witness testified he made a title map (Exhibit 14 (R. 294)) before beginning his survey (R. 95), on which he platted the descriptions from the patent on down to the present. He testified with relation to this title map, and it was later introduced as petitioner's said Exhibit 14; this being called to the Court's attention that it might not unwarrantedly consider it reflected the results of any survey on the ground.

On page 153 of the Record, petitioner's witness and engineer Leuty, in regard to his survey, which did not follow the distance-calls of the partition deed to J. F. Rogers but was made purposely to include the land herein in controversy, testified:—

> **"We set a corner 66 feet from the gear wheel. We put an inch and a half pipe there and marked some trees. The trees were within seven feet of the pipe. There was no road where we set the pipe. There had been an old road west of it. I will say twelve feet."**

showing that the only old road he found at or near the pinion and gear-wheel at the south end of the land in controversy herein was situated twelve feet west of the west line of the land in controversy herein—completely off of it.

Petitioner's witness Clements (R. 188):

"When I first knew the Davis land there was no road between it and the Rogers land to the east. I remember when the road was put there but I do not remember the year. I worked on the road. Mr. Davis had probably ten or twelve acres fenced right along the road next to the highway but the north end was not fenced. Mr. Davis did not later fence it. It was fenced next to the highway when I cut the road out but the other part was not. I helped cut a part of the road out that runs from the Gladewater Highway to the northeast corner. All of the road was not cut out at one time. Davis' fence on the east ran to where the road was cut but his fence did not go clear to the north line. The road was not cut out to the north line.

"There were several marked trees running along where the road was put. They cut the trees down and tried to put the road about the center of the line where the marked trees were."

* * *

"The road went right up to the Edwards Survey and then turned west across part of the school grounds. It ran west of the original pine tree."

* * *

"When I helped cut the road out it was about sixteen feet wide. The road north from where I stopped cutting to the north line of the survey was about twenty feet wide. The west side of the road was fenced."

Petitioner's witness W. H. York (R. 194) testified:

"The road when it was cut out north was from sixteen to twenty feet wide."

And with respect to any road south of the Longview and Gladewater Highway, York said: (R. 196)

> "I cannot recognize any part of the road running south in the picture. It is just a country road running through the trees and used for stock, getting them out of the bottom."

We feel, therefore, the Court may safely conclude there was ample warrant for the holding of the Circuit Court of Appeals that there was no road on the strip of land in controversy anywhere near the line of petitioner's leasehold, and that the finding of the trial court that the strip was left **"in part"** for a road was somewhat more than a liberal condescension in behalf of any testimony concerning any road there at the time of the partition in question.

Respondents feel called upon at this point to correct any serious misapprehension which might be derived from the map in the petition herein, appearing between pages 16 and 17, entitled **"Map drawn from trial courts' Findings of Fact and Conclusions of Law."** Respondents have carefully read and re-read the Findings and Conclusions and are wholly unable to find any reference to the strip in question being a road at the time of the partition except the Court's quotation of the statement of F. E. Rogers (R. 222) on the witness stand. Here Mr. Rogers stated the agreement of the heirs on the ground at the end of the survey which first revealed the strip of land in controversy, in the following words, as quoted by the Court: "We will just keep that as it

is." Then Mr. Rogers added, on the witness stand in 1936, "the same 66 foot tract was then being used in part as a logging road." We believe when the full facts about the actual agreement of the heirs on the ground, "We will just keep that as it is," are presented they will disclose a very different picture than that depicted in petitioner's map hereinabove referred to, alleged to reflect the Findings and Conclusions in this case.

In the face of all the evidence and holdings of the Circuit Court of Appeals, we think petitioner's map in the petition, above mentioned, showing all the strip herein in controversy as a road, presuming to reflect the Findings and Conclusions of the trial court, is a very misleading and serious misrepresentation of any fact properly derived from the evidence or the holding of the court in question.

There is nothing so misleading nor so hard to eradicate from the mind as a visual misrepresentation of fact. This map has no support in the record or in the findings, and visually misrepresents the area in controversy as it was at the time of the partition in question. It further carries the misleading import that it reflects the findings of the trial court as a whole, whereas it wholly fails to show that setting the whole of the J. F. Rogers tract over 66 feet westwardly to cover the land in controversy herein would displace all the other lines and corners of the survey and leave unpartioned corresponding strips along both the southerly east line, as indicated in the finding of the trial

court, as well as along the northerly east line of said Rogers Lot 2, as pointed out by the Circuit Court of Appeals, and likewise would make it impossible to reach the beginning point in the description as called for. We submit the evidence and findings do not in any wise support it, other than as a fair representation of the land as a whole as actually partitioned, irrespective of any question about a road or any call for adjoinder in question, although at the time of the partition and survey the Mings 2-acre tract shown in the northwest corner of the J. F. Rogers tract in blue on the map had not been cut out thereof. We are unable to protest about the character of map petitioner might choose to insert in its petition herein, but if such a map is to be referred to as a reflection of the record or findings, it would more faithfully serve its mission if it showed that the land in question was at that time in the woods and unfenced on either side except a strip along part of Wiley Davis' land, and that logging roads ran unhindered anywhere across any land in the vicinity, whether of the Rogers or of Wiley Davis, as testified to by Wiley Davis concerning such a logging road used by them across his land, hauling logs from any available stand of timber to the transient saw-mill already sold by the Rogers at the time of the partition, as testified by F. E. Rogers, who on the witness stand merely remarked that at that time of the year (in February, the time of the partition) they had used the land in controversy herein as a logging road. We do not attempt to tie these facts to the record, but they have better

warrant for consideration than the map in question, if it is to be referred to as reflecting the facts disclosed by the record and found by the courts below as existing at the time of the partition in 1899.

The references to the record and findings and holdings of the courts below, hereinbefore set out, show that petitioner has devoted 20 pages of its brief in discussing authorities that have no application to the facts of the instant case. Petitioner's lease, when confined to its distance-calls, does not margin any road or highway; there is no call in petitioner's lease or the J. F. Rogers deed of 1899, under which it holds, for a road or highway as a boundary, and neither petitioner nor its lessors acquired their title upon the strength of any map or plat showing the J. F. Rogers tract as bounded by a road or highway. The record shows that there was a strip of land anywhere from 50 to 66 feet in width lying between the J. F. Rogers land, cornering on the old pinion and gear-wheel, and the road over next to the Wiley Davis land or actually on the Wiley Davis land. The existence of this intervening tract can be seen from petitioner's own maps in evidence. Therefore, we submit petitioners' authorities and arguments are based upon a false presumption and have no application to the instant fact situation. Every case cited by petitioner in behalf of its First Proposition in its Petition is one of three kinds:

1. The described tract actually margined a road, highway or street.

2. The calls of the described tract called for a road, highway or street as a boundary; or

3. The tract was purchased with reference to a map or plat showing it to be margined by a road, highway or street.

The facts here do not bring this case within any of said three classes of cases supporting petitioner's position. The facts are wholly different from those of any case or relied upon by petitioner, and, as said by the Circuit Court of Appeals:

> **"But it is not unlawful to retain such a strip. If the intention to do so is clear, the contrary presumption must yield. And if the conveyance as made does not reach the highway or stream, it cannot be extended to it to avoid creating a separately owned strip."**

We believe such intention not to convey the strip is unmistakably revealed in the agreement entered into between the Rogers heirs on the ground with the surveyor at the time of the partition, as disclosed in the record and found by the trial court and the Circuit Court of Appeals, and J. F. Rogers being a party to such agreement no reservation or exception was necessary in the partition deed to him to prevent the land in controversy from passing on the strength of the presumption urged by petitioner here. Not only is such agreement and intent not to partition said land in controversy revealed as above stated, but it is adequately indicated by the descriptions in petitioner's chain of title alone, and by the old pinion and gear-wheel

standing unchallenged, marking the stake set by the surveyor, for more than thirty years, not only marking the southwest corner of petitioner's leasehold estate and the northwest corner of Lot No. Three of said partition, but within the knowledge of the witnesses living in the immediate vicinity during that period testified to as traditionally and reputedly marking the boundary of the J. F. Rogers tract and petitioner's leasehold estate, and permanently witnessing the ancient agreement of the Rogers heirs to leave undivided and owned in common by them the land in controversy herein.

We call to the attention of the Court that the presumption relied upon by petitioner is not a conclusive presumption or rule of law, even in fact situations which permit of the application of the presumption. It is said to be founded on a rule of construction in arriving at the intention of the parties. It is said in 11 C. J. S., 581: that "the rule is not absolute, but one of construction, effect being given to the intention of the parties in view of the whole instrument and surrounding circumstances." And; as said in 11 C. J. S., 696, "the presumption that the boundary of land abutting a highway or street extends to the center thereof, and that a grantor intended to convey to the center, may be rebutted." This is true even in cases where the land actually margins the highway. As said by our Supreme Court in Gill v. Peterson, supra, quoted by respondents in connection with their Point I, concerning such presumptions:

"Moreover, these rules, like other rules for construction of grants and for ascertainment of boundaries, as has so often been said, are controlling only when under the facts of the particular case they best enable the courts to arrive at the intention of the parties."

On pages 39 and 40 of petitioner's brief the contention is made that the cases of Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 57 S. W. (2d) 1080, cer. den. 288 U. S. 603, and Gulf Production Company v. Warren, 99 S. W. (2d) 616 (Tex. Civ. App. Writ of Error Refused) prohibited the admission in evidence of testimony showing that the surveyor Simmons stopped at 440 yards west of the northeast corner of Tract No. 2 and set a stake leaving the strip out of the partition for a road. Those cases hold that if land is margined by a road (Railroad) or conveyed by field notes which call to run along or with a road (Railroad) owned by the grantor, then parol evidence is not admissible to show the road was excluded. But in the instant case, as has been shown and as the Circuit Court of Appeals found, there was no call for a road and no description that margined a road. The trial court did not find anything about a road other than the reference to the agreement stated —**"We will just keep that as it is"** (R. 222)—made by the heirs at the Survey, referred to in the testimony of F. E. Rogers, after stating which (on the witness stand in 1936), as quoted by the Court in its finding, said witness remarked that the land in controversy had been **"used in part as a logging road."** The evi-

dence we have set forth and the finding of the Circuit Court of Appeals show it to be a narrow strip not perhaps at most over five feet wide, on the farthest western extremity of the land in controversy, the remainder being on the land of Wiley Davis, to the west.

Further, this testimony was not introduced upon any issue as to a road. Upon the theory that the field notes to tract No. Two were ambiguous when applied to the ground, and upon the testimony of petitioner's own engineers as to such ambiguity, as recited in the finding of the trial court, the testimony was introduced to show where the surveyor actually went, and in rebuttal to surveying testimony introduced by petitioner itself, thoroughly warranting respondents in submitting proof as to the survey as actually made. Further, time after time, on direct examination of petitioner's first witness, Baker, it brought out references to a road along the western extremity of the land in controversy, and as to the findings of said witness with regard thereto, and petitioners themselves having brought out this evidence, respondents were entitled in rebuttal to show by their witnesses where the road actually went and the agreement of the Rogers heirs with regard to the strip of land in controversy and its relation to the road in question. If petitioner objects to such reference by F. E. Rogers to the road as unauthorized and demands said witness' reference to the road be stricken or ignored, respondents have no objection; but the testimony of said Rogers regarding the actual survey as made

and the agreement and intention of the parties to exclude from the partition and hold in common the land herein in controversy is in the record with ample warrant and authority of law, as hereinbefore shown in respondent's foregoing points I and II.

As to the competency of said witness in regard to the testimony in question, under the Texas law, some member of the orginal surveying party is competent to give such testimony. Said witness was not only a member of such party but one of the heirs whose land was being surveyed and partitioned. **Vireca Corporation v. Cole,** 129 S. W. (2d) 433 (Tex. Civ. App., Writ of Error Refused); **Gill v. Peterson,** supra; **State v. Sullivan,** supra; **Blake v. Pure Oil Co.,** supra; **Humble Oil & Refining Co. v. State,** 104 S. W. (2d) 174 (Tex. Civ. App., Writ of Error Refused); **Beck v. Gulf Production Co.,** 113 S. W. (2d) 258 (Tex. Civ. App., Writ of Error Refused).

As we have stated, without exception petitioner's cited authorities on its First Proposition are cases in which the land conveyed margined a road; where the calls in the description called for a road, or where said land was sold with reference to a map or plat showing it to be margined by a road, none of which circumstances apply here. It is obvious that if a grantor can sell his interest in a road, even abutting his land, and retain the abutting land, he can also sell the land without selling his interest in the road, if the intention to do so is clear. Such intent and agreement is unques-

tionably manifest in the survey and partition in this case, apart from the testimony of F. E. Rogers, complained of, from the fact that no part of the road in existence at the time of the partition in 1899 was contiguous to the J. F. Rogers tract or in fact within fifty feet of it, as disclosed by many of petitioner's own witnesses and engineers, and many of the most competent witnesses left considerable doubt any of the land in controversy was in the road in question, as we have shown. The testimony was **not that the tract was retained in common by the heirs as a road,** but that it **has been used in part as a logging road.** (As F. E. Rogers testified (R. 222), "We had sold the mill but the road was still there"—indicating it had been a logging road.) The land was of no considerable value then, as disclosed by the consideration in deeds of the period of record, running $3.00 to $4.00 an acre, but now that the strip in question is worth many times the whole of the original Rogers Estate then partitioned, petitioner would claim it on the strength of a road not mentioned in its chain of title, not represented to it as having any relation to it, and only found by the Rogers heirs to exist on their land, or part of it, when they had completed their survey for the partition, in 1899.

As we have said, there was nothing in petitioner's chain of title to reveal even the possibility of the existence of the land in controversy herein. The patent to the Thomason Survey (R. 96) called for a 640-acre

survey. The Rogers boys owned the east half, as will be seen from the deed to their mother, Louisa Rogers (R. 103). This deed is in varas, calling for a tract 1900 varas long by 950 varas wide. 1900.8 varas is 1760 yards. So, in yards, the land partitioned called to be 1760 yards north-and-south by 880 yards east-and-west. Thus, as said by F. E. Rogers on the witness stand (R. 220), "The east half was rated as 320 acres in the deed." So it will be seen that when Surveyor Simmons located two of the partitioned tracts in the north half of the 320 acres, he had two tracts each 440 yards long, thus accounting for all the record length of the north line of the partitioned tract. Surveyor Simmons had theretofore surveyed the west half of the survey (R. 220) and evidently knew the location of the east line thereof, for when he got to the end of his 880-yard measurement from the northeast corner of the Survey, he remarked to the heirs there was yet a chain or 66 feet between that point and the east line of the western half of the survey (R. 222). By this time, as shown by the record, they had done a lot of work. This fact must be borne in mind, as it has preponderant bearing on this whole case—perhaps is the most important element revealed by the evidence.

Analyzing Rogers' testimony (R. 220 et seq), we see they had chained and doubtlessly marked lines completely around the W. H. Rogers Lot No. 1, a tract 440 x 880 yards, a distance of a mile and a half, then walked a quarter of a mile back to the northwest

corner of said Lot 1 and surveyed and chained from there to the 880-yard measurement where the surveyor found the excess chain left over, indicating the 66-foot strip. As will later be revealed, he had also marked bearing trees at corners and possibly lines-trees along the course, as is the practice in timbered country.

Somewhere along their course, it becomes evident they had changed their plan of the partition. When they began, they had told the surveyor they wanted the land cut into four 80-acre blocks (R. 221). When they finished the tracts were as shown by the outline sketch misrepresenting the Court's Findings, in the petition herein.

To show the evolution of this change in plan of partition, it is necessary to leave the testimony of Rogers, protested by petitioner here, and take up petitioner's own evidence. Petitioner seems to prefer it, and it suits our purpose better here, also. It will be noted that from pages 264 to 274, inclusive, of the Record, petitioner introduced some most valuable evidence which had not been made available to respondents, which petitioner secured from a real estate man, R. M. Wood, who once owned a tract in the J. F. Rogers Lot 2 of the partition and still held several old papers pertaining thereto. In this introduction, petitioner submitted the original field-notes and plats of most of the survey, in the handwriting of the surveyor himself. This evidence was introduced in attempt to disprove Rogers' testimony as to the survey (R. 220 et seq.) While not accomplishing

this purpose (so held by the Circuit Court of Appeals (R. 335),) this evidence served to reveal almost all the facts about this survey, instead of just those facts Rogers could remember after an interval of 40 years.

It will be noted that the original exhibits so introduced by petitioner are shown by photostatic copies, pages 269 to 274, inclusive, of the Record. Apparently these exhibits are not here shown in the order of their preparation or in the order of the survey, but that little matters. Petitioner contends this data conclusively proved Simmons surveyed only the southern line of partioned Lots Nos. 1 and 2, as shown by its photostatic Exhibit No. 45, page 269 of the Record, as found translated into type on page 265. It appears they did not examine and analyze them closely enough.

As willl be remembered, Rogers testified the surveyor was asked to cut the land into four 80-acre blocks, and that Simmons started at the northeast corner of the 320-acre tract and first surveyed the W. H. Rogers tract, Lot No. 1. That he then began at the northwest corner of said Lot No. 1 and surveyed Lot No. 2, for J. F. Rogers, along the north line of the tract, over to the 880-yard point, where he found the excess strip in controversy here.

Proceeding on the theory that Rogers thus told the truth and remembered correctly, at least as to the beginning of their surveying work, we will first examine and analyze petitioner's Exhibit No. 46 (R. 271), upon which it will be seeen the surveyor drew the rectangular

outline of Lot No. 1, surveyed as an 80-acre tract. Underneath this, in handwriting, he shows the field-notes, bearing trees, etc. of his survey of this lot, showing that he started, as stated by Rogers, at the north-east corner of the survey, but first went south to the center of the east line of the Thomason survey, calling for the bearing trees at this point; then he proceeded west 440 yards to corner, (this marking the dividing corner between Lots Nos. 1 and 2 on their south line), which the surveyor at this point describes as "being the center of the Rogers Tract" under survey—that is, the center of the 320 acres—which would have been exactly true if there were no excess in the line than under survey. After fixing this point on the ground by a bearing on a pine stump, the surveyor proceeded on west 440 yards more "to corner 4 (not shown on plat) to Bozeman land." This exhibits with absolute certainty that at that point in his survey Simmons, knowing he had gone west 880 yards from the east line of the Thomason Survey, thought he had reached the Bozeman land—the west half of said Thomason Survey. At this point he takes a bearing on a Pine S 65 deg. W 6 links and Pine S 80 E. 14 links—witnessing corner now marked by pinion and gear-wheel. He then calls to "corner back to corner 3, center of the tract" (dividing point between Lots Nos. 1 and 2) "and run north 880 yards to corner 5" (in north line of Thomason Survey) "Pine N 40 deg. E 5½ links and Pine S 32 deg. W 11 links; thence East 440 yards to starting point, containing 80 acres," (as testified by Rogers) "which is

Lot No. 1, less 4-4/5 acres off for J. W. and F. E. Rogers, platted red." This 4-4/5 acres is noted in shaded area in rectangle in southwest corner of surveyor's exhibited plat of the 80-acre tract, Lot 1.

Thus, Simmons actually surveyed out Lot No. 1 as an eighty acre tract, and, at this stage of his work apparently merely sketched the 4-4/5 acres in, "platted red", for as yet there is no indication, by calls for bearing trees, etc., it had yet been surveyed.

It is well to note here, that while surveying the south line of said Lot 1, the surveyor, as shown by said Exhibit 46, went on all the way across the land in partition, 880 yards, in a straight line, to what he at that time thought was the east line of the Bozeman west half of the Thomason Survey, from which point he came back to finish the survey of said Lot 1, as disclosed by said Exhibit No. 46.

Since the surveyor did not discover the existence of the excess 66-foot strip in his survey of said south line of Lots Nos. 1 and 2, it is obvious he must have done so by a survey of the north line of the J. F. Rogers tract, at the point testified by F. E. Rogers the surveyor actually found the excess strip in question here.

At some stage in the above surveying, careful analysis reveals inevitably there must have been some discussion among the heirs, who were with the surveyor, about the relative value or desirability of the

four tracts when blocked in equal 80-acre parts, as ordered, or the fairness of division in that manner. As willl be remembered, all the improvements were on the north half of the 320-acre tract (R. 222 and 228), and through this north half ran the public road between Longview and Gladewater (see plat in petition), giving to Lots Nos. 1 and 2 advantageous accessibility, and leaving the joint tract of the younger boys a quarter of a mile from the road and relatively undeveloped. The older boys, W. H. and J. F. Rogers, had their homes on the northern tracts (R. 222), and naturally preferred their portions should include them. The younger boys, being unmarried, were willing to take their together, to the south. But, from the nature of the subsequent survey, as will be shown, it seems the question of the old homestead or "home place" came up for consideration, and we find F. E. Rogers testifying (R. 222) about the surveyor later cutting out this old "home place" for the younger boys. It will be noted that the only "cutting out" that was done was out of the south central part of the northern tracts, Lots Nos. 1 and 2, as shown by the deeds and sketch or plat in the petition herein, so it becomes plain that must have been the location of the old "home place" which, after commencing the survey, the heirs decided should go to the younger boys. As Rogers testified (R. 222) "He (Simmons) then went over and surveyed out the old home place for myself and my brother, J. W."

Petitioner's Exhibit No. 45, a photostat of which is shown on page 269 of the Record, and a translation into type at page 265, unquestionably represents the surveying work by which the old "home place" was cut out for the younger boys, thus altering the form and acreage of the respective portions as indicated by the deeds in evidence and petitioners map in the petition.

In surveying this line, we find from the surveyor's own handwriting, as alleged by petitioner, the following field notes:

"Starting at corner No. 2 which is the S E C of W H R Tract, witness tree Red Oake S 69 deg. E 10 links & Pine N 43 deg. W 14 links with cross on each tree;

"Thence West 374 yards, no witness trees given.

"Thence North 308 yards, Red Oake S 45 deg. E 4 links;

"Thence West 66 yards to J. F. R. Line Pine S 2 deg. W 27 links;

"Thence West 154 yards, no witness trees given;

"Thence South with about 12 deg. West about 310 yards, no witness trees given. Thence West 224 yards to corner 4" (Referred to and described at this point by Petitioner's Exhibit 46, hereinbefore discussed—being the point now located by the old pinion and gear-wheel) (Copying, continued): "Witness Trees Pine S 65 deg W 6 links & pine S 80 deg E 14

"Thence South 880 yards to S W C of Tract

"Thence East 880 yards to S E C of Tract

"Thence North 880 yards to N E C of Tract the Starting Point. Containing 176 acres for J W & F E R Lot No. 3—Plated (Platted) Red" (The photostat of the plat referred to will be seen on page 270 of the record).

F. E. Rogers had testified they surveyed around the north half of the partitioned land but not around the south half thereof (R. 225). As will be noted, the last three calls of the description, from "corner 4" referred to by the Surveyor, located at the old gear wheel, to the Southwest corner of the tract, then to the Southeast corner and back to the starting point, indicate no bearing trees, as do most of the other calls, tending to substantiate the testimony of F. E. Rogers they did not go around the south half.

It is vitally important to note at this point that on his second survey of the south line of the partitioned Lots Nos. 1 and 2 the surveyor, when he had reached the total western distance called for—880 yards—bringing him to the point where on his first straight-line survey he had called for the "Bozeman Land", carefully mentioned the same bearing trees and, apparently just as carefully, **failed to mention the "Bozeman Land"**. This further supports F. E. Rogers' testimony the surveyor first learned of the 66-foot strip at the end of his survey of the north line from the northwest corner of the W. H. Rogers Lot 1, 440 yards west there-

from, or 880 yards west of the northeast corner of the Thomason Survey—the original beginning corner. Petitioner introduced no field notes of the surveyor showing a survey of the north line of the J. F. Rogers tract, and in the Circuit Court of Appeals argued that the field notes of the survey introduced by it contradicted the witnesses as to where the surveyor went and how he located the corners of Lot No. 2; but the Circuit Court of Appeals stated in its original opinion:

> "It so happens that the field notes of Lot No. 2 have not been found. Those for the other lots do not show the surveyor at or near the Wiley Davis corner, or measuring the north line 440 yards or any other length, for this line was not common to the other lots. Only the field notes for Lot No. 2 would show what was done at or near the northwest corner of that lot. There is no contradiction of the witnesses by the field notes introduced."

On the other hand, these field notes and exhibits introduced by petitioner, properly analyzed and considered in relation to the testimony of F. E. Rogers and the other testimony of record, reveal a remarkable confirmation of respondents' evidence and contentions herein. So considered and analyzed, it is certain they can offer little cheer to petitioner.

Respondents feel that we now have before us the facts necessary to show, without apparent doubt, why the 66-foot tract was omitted from the partition and retained in common ownership, as testified by Rogers. As hereinbefore stated, Petitioner's Exhibit No. 46, first

discussed, showed they had surveyed and chained one and three-quarter miles, and necessarily retraced their course three-quarters of a mile more, making a total distance on that initial survey of two and a half miles, besides the marking of line and bearing trees and carefully recording all this detail. Then, as related by F. E. Rogers, they came back a quarter of a mile to the W. H. Rogers northwest corner, and surveyed and chained a quarter of a mile to the point 880 yards from the northeast corner of the survey, where the surveyor discovered the excess 66-foot strip, making three miles they had chained, marked, recorded and retracted when the excess was noted.

As shown, this 66-foot strip extended the full length of the western line of the partitioned land. In all, it contained eight acres, exactly, which was all excess acreage they had not contemplated, over the 320 acres called for in their deed. The whole eight acres might have been worth $25.00 or $30.00, as indicated by the deeds of that period in evidence here. To apportion said strip equably among the partitioned tracts would require re-surveying, re-locating and re-marking many of the lines and corners they had already established. Also, it would require arduous computation to distribute the small equities therein among the irregularly shaped blocks of the partition, as will be noted by a glance at petitioner's outline map in the petition. Surveyors cost money and money was scarce in 1899 and land somewhat plentiful in Texas. A large part of the value each

tract would gain by the apportionment of the eight acres would be consumed in surveying expense. If they left it like it was, they would all still own it and, if they chose, could dispose of it among themselves later if they saw fit. Under these circumstances, what more natural, rational, common-sense view could they take of the matter, with yet other long and arduous surveying ahead of them, than there to agree, as F. E. Rogers states they did, "We will just keep that like it is". (R. 222).

Thus we can find no warrant, from any fact established by the evidence, any finding of either court below or any probability even that might be deduced from the record, for petitioner urging, commencing with its Assignment of Error No. 1 (R. 302):

> "The Court found substantially the following as the facts: * * * the surveyor * * * stopped at a point 880 yards west of the northeast corner * * * and then surveyed south 880 yards and set another stake, **leaving a 66-foot strip out for a road at the request of said heirs** * * *" etc.

and further adding to such represented findings of the Court,

> "(d) that thereafter, the heirs exchanged deeds, the said J. F. Rogers being partitioned a tract that the field notes in his deed when applied to the ground by course and distance * * * extended **only to the inside (east) line of said road** * * *"

when as a matter of fact there is no testimony in the record that such field notes came anywhere near any

road on the land in controversy at the time of the partition in question from which petitioner's field-notes were derived, and such finding would be utterly hostile to every material fact in the record bearing upon the location of any road on the ground at the time of said partition, even to the testimony of all petitioner's own witnesses; and, further, (R. 303), in the same Assignment of Error, petitioner contending:

> "Under said findings of fact, Complainant's lessors acquired by said partition deed the **fee simple title to all of said 66 foot strip since his field note description by course and distance went to the inner edge of the road, which road was wholly laid out on land belonging to his grantors** * * * "

when as a matter of fact none of said allegations are or ever have been true, and the same are contrary to the preponderance of petitioner's own evidence and the findings of the courts below, and this petitioner well knows.

Respondents see no occasion for the courts below if facts of the record can so materially be ignored and mispresented as to require the devotion of perhaps the larger part of their brief to the correction of petitioner's factual presentations not founded in the evidence or any finding of the courts below, thus presenting a de novo trial on the facts before this Court.

As under previous issues covered herein, involving petitioner's fundamental authorities, respondents find it impossible most effectively to proceed with a fair

discussion of the road issue without necessity of devoting far more of such discussion to the correction of petitioner's repetitious mispresentation or assumption of the basic facts and holdings revealed by the record. It seems, as we proceed, its whole case is built, on the one hand, upon mispresentation of decisions allegedly supporting its propositions and, on the other, upon mispresentation of the facts of the record allegedly supporting its authorities.

Petitioner's urged **legal title** predicated upon a road margining its lease or upon a strip intendedly left for a road by partitioners is no more supported by the record or findings of the courts below than its **legal title** on the call for adjoinder was supported by a full quotation of its cited cases of Swann v. Mills, Garrison v. Crowell and Miller v. Southland. Even as one loses petitioner's case in consulting its authorities, he finds he also loses petitioner's authorities in attempting to apply them to the petitioner's case.

The substantive law of Texas having been followed strictly throughout all the courts below, as we believe is adequately instanced by the abundant authorities of our Supreme Court presented in the foregoing Points I and II of this brief and as cited in the opinion of the Honorable Circuit Court of Appeals itself, all applicable and pertinent to the facts adduced and found in this case, any inference that the Circuit Court of Appeals decided any issue in this case contrary to the rule and spirit of Erie Railroad Co. v. Tompkins, 304

U. S. 64, 58 Sup. Ct., 817, 82 L. Ed. 518, 114 A. L. R. 1487, can be true in the face of the Texas Supreme Court decisions applicable to the facts in this case only if it is to be held the Supreme Court of Texas either doesn't know or hasn't declared the laws of our State.

We see no virtue in citing authorities to refute contentions and issued based upon factual presentations foreign to the record, findings and holdings of the courts below. We have no complaint of petitioner's cases but of the use it seeks to make of them. We see no virtue in "spanking" the courts below before adequately determining the charge presented against them has semblance of warrant more urgent than the record and findings in this case appear to reveal.

The following facts alone, being the essential elements of petitioner's issue of legal title predicated upon a road, preclude the application of the rules urged by it:

J. F. Rogers, petitioner's predecessor and origin of its title, was a party to the agreement to leave the land in controversy herein unpartitioned. The whole of said agreement (R. 222) was: "We will just keep that like it is"—that is, not included in the partition survey or in any of the land they had apportioned as their several estates. Nothing was then said about a road, and no road on it margined any of the partitioned land by more than 50 feet, as we have more than adequately shown. The said Rogers having been a party to said

agreement, accepted his title thereunder with full knowledge thereof, and there was no occasion to make any reservation in the deed to him, as contended by petitioner, to prevent passage of the title to the land in controversy to him on any presumption of adjoinder or contiguous road.

The descriptions in said partition deeds and petitioner's chain of title, as well as the monuments of survey therefor and the field-notes of the surveyor introduced by petitioner itself (R. 264-274 inclusive) all exhibit the intention of the partitioners to leave the land in controversy herein unpartitioned and owned in common by the heirs, as testified to by F. E. Rogers (222, Record).

Petitioner's chain of title and leasehold description making no mention of any road on the land in controversy, referring to no map or plat indicating a road, and no road actually margining its land at any point contiguous to the land in controversy, petitioner acquired no legal title on any theory of abutting road and acquired only such title as might be derived from its predecessor J. F. Rogers, who was a party to the agreement leaving the land in controversy in the common ownership of the heirs of Louisa Rogers, and they being the owners of record of the legal title thereto, petitioner had not only no legal title but not a vestige of equity therein.

IV.

That petitioner has exhibited that character of bad faith in equity, both toward respondents and the court in the instant case, in a matter having immediate and necessary relation to the equity sought by it in this litigation, as would deny it remedy in a court of equity.

So far was petitioner from considering itself the owner of the legal title to the land in controversy herein, as an innocent purchaser or otherwise, when its survey subsequent to its lease disclosed to it the existence of the land in controversy herein it prepared a so-called correction or "confirmation lease", changing the distance calls from yards to feet and extending same to cover the land in controversy herein, and proceeded by stealth, false representation, fraud and swindle to acquire by criminal means the leasehold title to which it obviously considered it had no legal claim. Its agent who procured the execution of this so-called "confirmation lease" admitted upon the witness stand (R. 171) that he had represented to petitioner's lessors said "confirmation lease" covered only the same land as its original lease in faith of which, and without attempting to compute the feet into yards for comparison with their original lease, but relying solely upon said representation, said lessors executed said so-called "confirmation lease", divesting themselves of the leasehold estate in the land in controversy herein, wholly without consideration. These facts were testified to also

by F. E. Rogers (R. 224) and by J. E. Rogers (R. 258), the latter witness testifying as follows: (R. 258)

> "Later on, Mr. Cox came to me with a ratification instrument. He told me that it included the same land the Chandler lease had. I found out that it included more land than the Chandler lease and, after I found it out I said something to Mr. Cox about it in front of the filling station that I was operating at that time.
>
> "Q. What did he say about it?
>
> "A. He said he was working for the company.
>
> "Q. He said he was working for the company, and you would have to blame them?
>
> "A. Yes."

The trial court held such "confirmation lease" void as fraudulently acquired (Findings, par. 17, Record p. 68; Conclusions, par. 4, Record p. 71).

In this cause petitioner pleaded this so-called "confirmation lease" in its Amended Bill of Complain, paragraph IV (R. 24), upon which this case went to trial in the trial court, as an instrument of its leasehold title.

Thus petitioner has exhibited that character of bad faith in equity, both toward respondents and the Court in the instant case, in a matter having immediate and necessary relation to the equity sought by it in this litigation, as would deny it remedy in a court of equity.

Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203;

Deweese v. Reinhard, 165 U. S. 386, 390, 17 S. Ct. 340, 41 L. Ed. 757;

National Fire Ins. Co. of Hartford v. Thompson, 50 S. Ct. 288, 281 U. S. 331, 74 L. Ed. 881;

Keystone Driller Co. v. General Excavator Co., 54 S. Ct., 146, 290 U. S. 240, 78 L. Ed. 293—Motion denied 54 S. Ct. 556, 291 U. S. 651, 78 L. Ed. 1045;

Martin v. Luster, 85 F. (2d) 833, certiorari denied 57 S. Ct. 510, 300 U. S. 667, 81 L. Ed. 874;

Cochran v. Burdick, 89 F. (2d) 831, 67 App. D. C. 87.

V.

That any holding of the Circuit Court of Appeals about the procedural issue of burden of proof was not essential to the determination of the case, and any declaration by said court upon such question was therefore mere dicta. (Responsive to Propositions II, IV and V of Petition and Second and Third Points of petitioner's brief.)

(This point, by reason of the foregoing presentation, becomes so apparent upon mere statement, we cover it in a paragraph or two of the Conclusion, following.)

CONCLUSION

We do not wish to presume upon the time or indulgence of the Court to argue or discuss the emasculated

propositions that remain. All were built upon the fantasy of **legal title**, without warrant or authority in any recognized decision or declaration of our courts, and impossible of support in the very cases relied upon and so strongly and persistently urged at every point and in connection with every authority in petitioner's brief and petition. If the words **legal title** are deleted from petitioner's brief and petition there is no case before this Honorable Court, on the facts of the record here.

Without legal title, petitioner was in no position to urge a burden of proof contrary to the holdings thereupon of the Circuit Court of Appeals, and any expression by said Court upon this issue, whether right or wrong, was unnecessary to the decision of the instant case.

There is no point whatever to petitioner's proposition on reformation of deed and limitation in regard thereto, urged in its Proposition VI, inasmuch, as disclosed by our quotation from Wilson v. Giraud, supra our Supreme Court has repeatedly held, from time immemorial, that in such a fact situation as here presented there is no question of reformation, but only of giving effect to as many calls as possible in a defective and ambiguous deed description.

Petitioner hasn't failed to find abundant excellent cases to support the propositions of its brief, if only those propositions were pertinent to the record herein, but its whole case is built upon the commercial and propagandic theory that if it repeated the words "legal

title" frequently enough, in connection with every proposition and authority urged by it, it might have telling effect, and when this is supported by citations of authorities presented so as to withhold the very earnest differentiation of the Court itself against the very facts urged, it appears to have given pause, at least, to the Circuit Court of Appeals.

The correct determination of this case requires but a fair statement of the facts and issues related thereto. We are before this Court upon issues not fairly involved in the litigation, not essential to its determination, under the applicable laws of our States, and serving only to confuse and cloud its clear and simple outlines.

Earnestly we have endeavored to trace the familiar outline of the facts in this case in the petition and brief before this Honorable Court, but almost imperceptibly the trail leads from fact to fiction; from iron monuments to roads in heaven; from pinioned earth to the poetry of words, until it seems, in this supernal realm of the law, petitioner points to a wraith transformed. We strain to see, but through the haze our mundane eye views only the battered corpus that was. We would not dispute the reality of things unseen, and it may be there is substance in shadow. But the case presented here does not afford us even a silhouette that patterns the record below.

Our State is broad and covered with land that has been fought over from the time the turbulent Dons

planted upon it the Holy Cross. Good cases are multitudinous in our reports, as witnessed by petitioner's brief. We respect and honor them all. But the longer we practice and the broader our ken, occasionally we are led to wonder if Holy Writ isn't oft' quoted to devious ends.

Wherefore, respondents respectfully pray that the judgment of the trial court and of the Circuit Court of Appeals be affirmed.

Angus G. Wynne

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1939.

No. 28

CITIES SERVICE OIL COMPANY,

Petitioner,

vs.

B. P. DUNLAP, ET AL,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

REPLY BRIEF OF RESPONDENTS

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REPLY BRIEF OF RESPONDENTS

The Court having granted Respondents five days in which to file a reply to the brief filed by petitioner on the day before submission, respondents beg leave to submit to the Court:

Petitioner is before this Honorable Court asking that the case be rendered or remanded to the Circuit Court of Appeals in the one instance because it did not pass

upon the issue with reference to its claim of innocent purchaser and at the same time to ask this Court to send the case back to the Circuit Court of Appeals because the Circuit Court of Appeals did pass upon the issue as to the road and, as it contends, against the weight of authority in Texas.

Respondents admit that if the question as to defense of innocent purchaser is not a matter of pure procedure, that it is not definite from the opinion of the Circuit Court of Appeals that it passed upon the issue of innocent purchaser. Therefore in this reply brief respondents first address themselves to the claimed issue of the Circuit Court's failure to hold that the property was owned by the petitioner under its claim that the property did abut a road.

The trial court found "the four Rogers boys, namely, W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers, who were with the said J. H. Simmons, informed him that they would leave the 66 feet out of the partition and use the same jointly and keep it like it was. The same 66 foot tract was then being used in part as a logging road." (Record, page 63, lines 22 to 27.)

The court further found in its conclusions of law (Record, page 70): "and is most consistent with the construction of the calls by the parties themselves as evidenced by their acts and conduct over a period of about 30 years subsequent to the date of the partition and prior to the discovery of oil in East Texas."

Following these findings by the trial court the Circuit Court of Appeals made findings which we will not copy in full here, but the same are set out fully on pages 336-337 of the Record, and then on page 337, at the bottom, used the following language:

> "There is a plainly expressed intention not to add this strip to Lot No. 2 but to retain joint control and ownership of it. Since the deed as prepared said nothing about a road as a boundary, there was no occasion to make a reservation of the land though to some extent on its far edge it was used as a road. The case presented is not one requiring an extension of the deed beyond its true calls. In recent years a broad public road occupying most of the strip has been laid out, but this development years after the making of the deed can not have the effect of extending its scope." Citing 11 Corpus Juris, Boundaries, Par. 35.

It is thus clear that the Circuit Court of Appeals passed on the issue as to the strip in question being a road. From the statement made to the Court and some of its questions of counsel in the argument, counsel feels sure that this Honorable Court does not intend and never did intend to pass on the issues of fact for the Circuit Court of Appeals, but to show the correctness of the Circuit Court of Appeals' ruling we ask this Honorable Court to refer to the very case cited by petitioner in its brief, and that is the case of **Rio Bravo Oil Co. v. Weed**, 121 Tex. 427, 50 S. W. (2d) 1080. In that case there was involved not only an accurate description of the land as bordering on a rail-

road by a plat showing four of the tracts of the partition bordering the railroad right-of-way, but the deeds in the partition bordering the railroad right-of-way, but the deeds in the partition referred to the plat and called for it as a description of the lots which were described with reference to the lot numbers of the plat and without field notes. The court held that not only the terms of the deed itself but the subsequent conduct of the parties to the partition revealed unquestionably their intent to partition the whole of the land involved as disclosed from their chain of title alone but here in our case both the trial court and the Circuit Court of Appeals each found that it was the intent of the parties not to include the strip in the partition but to hold and own it jointly. In the partition deeds in the Rio Bravo case the court states and calls attention to the following provision:

> "To have and hold in severalty as his share of said 52 acres,"

and to show that the case is opposite to the instant case in every respect the court goes on to state:

> "To hold that the land included in the right-of-way was intended to be thereafter held in common would not only defeat this purpose, but would bring the terms of the deed into irreconcilable conflict. No extrinsic evidence is required to enable us to gather the intention of the parties to divide the entire fifty-two acres."

The court further says:

> "It is a familiar rule of construction of written instruments where a contract is ambiguous in its terms, a practical and reasonable construction given to it by the parties thereto before any controversy has arisen as to its meaning will generally be given controlling effect by the courts."
>
> * * * * * * * * * *
>
> "It is thus seen that the parties to this particular deed have voluntarily placed in their own chain of title instruments containing the recitation that these former joint owners had in fact divided the entire 52 acres."

The court further uses language that the construction given the deed should harmonize with the terms of the deed, including the scope, subject-matter and purpose thereof, and then on page 1087 says in this behalf:

> "It must be conceded that they were privileged **at their pleasure to make partition of the land on both sides of the railroad right of way, and thus remain tenants in common in the strip over which the right of way was located,** or they could include the fee of the right of way in the partition, subject to the easement owned by the railway company. Sibley v. Holden, 10 Pick. (Mass.) 249, 20 Am. Dec. 521; Hill v. Woodward, 100 Miss. 879, 57 So. 294, 39 L. R. A. (N. S.) 538, Ann. Cas. 1914A 390."

Thus the Supreme Court of Texas has held that the parties were privileged at their pleasure to make partition of the 66 foot strip in this case or they were privileged to remain tenants in common in the strip

if they desired. Therefore it was not unlawful for this to be done, as said by the Circuit Court of Appeals. It is clear therefore that the Circuit Court of Appeals did pass upon the issue, just as the trial court passed upon the issue, and having passed upon this issue in accordance with the very case cited by petitioner we feel sure that this Honorable Court must of necessity hold that it will not direct the Circuit Court of Appeals how it shall find the facts or how it shall construe the decisions. If the Circuit Court of Appeals actually passed upon the issue as shown by the opinion, clearly this portion of the application of the petitioner should be refused.

We now for one moment resubmit to the Court as submitted in the argument that question with reference to the point as to innocent purchaser. We frankly state to the Court that we do not know ourselves other than as set out in this short statement whether it should be held that the question of innocent purchaser is one of substance rather than of procedure.

There is no proof in the record that petitioner was a bona fide purchaser for value without notice. It was the opinion of the Circuit Court of Appeals that petitioner being the actor had the burden of proof to show its title. Petitioner was complainant in the trial court. It filed and brought the action in the federal court in equity to remove cloud. (Record 20-28.)

Petitioner asserts that if it had filed this case in the State Courts of Texas the burden would have been placed upon respondents to prove that it was not an innocent purchaser for value without notice, and that under the decision in **Erie R. R. Co. v. Tompkins** the same rule should have been applied in the federal courts.

The crux of this controversy then becomes one as to whether the burden of proof on the question of innocent purchaser is a matter of procedure as stated by the Circuit Court of Appeals or a question of substantive law as contended by petitioner. In his concurring opinion in Erie R. R. Co. v. Tompkins (304 U. S. 64, 92, 58 Sup. Ct. 817, 828) Mr. Justice Reed had this to say on the matter:

> "The line between procedural and substantive law is hazy but no one doubts the federal power over procedure."

Professor Stumberg in his recent work on **Conflict of Laws** has had occasion to make an analysis of these matters:

> "Procedural rules are those which concern methods of presenting to a court the operative facts upon which legal relations depend; substantive rules those which concern the legal effect of those facts after they have been established." Stumberg, Conflicts of Laws (1937), 128.

Ibid, 131:

> "Since proof is directly concerned with the method of presenting to a court the facts upon which,

ultimately the legal relations of the parties depend there could be but little doubt that it relates logically to procedure and not to substance. This is also true of the burden of going forward with the evidence and the question as to who bears the risk of non-persuasion."

Ibid, 135:

"Burden of proof would seem to fall within the procedural field since it relates to the method of presenting the facts to the Court."

On page 46 of its brief petitioner goes so far as to contend that as a matter of substantive law respondents should have further pleaded petitioner was not an innocent purchaser. Pleading has always been a matter of procedure to be determined by the federal equity practice. Again we quote from the text of Professor Stumberg:

"**Rules of practice and pleading are clearly procedural.** Such matters as forms of actions, parties to the suit, and rules of practice and pleading are all customarily treated as procedural."

Petitioner itself so construed the matter for in the trial court it took upon itself the burden of pleading that it was an innocent purchaser.

"Complainant avers that it and its predecessors in title purchased in good faith paying a valuable consideration therefor the oil and gas lease which it now owns and holds, relying upon the call in the deed and oil and gas lease for the Wiley Davis Northeast corner as marking and fixing the Northwest corner of the tract of land conveyed by J. W. Rogers and others to F. E. Rogers." (Record 45.)

Its claim of innocent purchaser was in a replication to defendant's answer and cross-action, to deny the facts that had been plead in such answer and cross-action.

The Texas courts themselves have construed their rules about bona fide purchasers not to be rules of substantive law:

> "The doctrine of protection to a bona fide purchaser is not a rule of property, but is merely a rule of inaction. 2 Pomeroy Eq. Jur. (14 ed.) par. 743. It is only available by way of defense and enforces no right and does not determine the question of title between the parties." Neal v. Holt, 69 S. W. (2d) 603 (Tex. Civ. App.—Writ of Error refused)."

Refusal of the writ of error is an approval upon the part of the Supreme Court of Texas of the opinion of the Court of Civil Appeals under the provisions of Art. 1728, Vernon's Ann. Tex. Civ. Stats. (1925) Vol. 3 pocket part: "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined the Supreme Court shall refuse the application."

In the above case the Court of Civil Appeals, after stating that the Shell Petroleum Company had under findings by trial court had "actual notice through abstracts of title," etc., on page 607 of the opinion stated in part:

> The Shell Petroleum Company is not in the position to claim as an innocent purchaser herein because it had both actual and constructive notice

of the contents of the application for sale, etc., each of which appeared in its chain of title. It is charged with notice and knew that there was not attached to the application * * * any written report, etc. * * * *

The Court then says:

"The further and final question arising is whether the Shell Petroleum Corporation is in a position of a bona fide purchaser and can set up such a defense, etc. * * * The most general statement of the doctrine of bona fide purchaser describes the purchase as one made in good faith for a valuable consideration and without notice. The purchaser may pay a valuable consideration, act in good faith and yet he may have notice of matters or circumstances which vitiate the title of the immediate predecessor under whom he claims. It is an elementary doctrine therefore that independently of valuable consideration and good faith, notice will destroy the character of a bona fide purchase and defeat the protection otherwise given to it. * * * The doctrine of protection to bona fide purchaser is not a rule of property, but is merely a rule of inaction. 2 Pom. Eq. Jur. (14 ed.) 743. It is only available by way of defense and enforces no right and does not determine the question of title between the parties. It means that equity will refuse to interfere to aid the plaintiff in his suit because under the circumstances of the case it would be unconscientious for him to have what he is seeking to obtain."

Thus we have the Supreme Court of Texas, by its refusal of a writ of error, stating that the doctrine of

innocent purchaser is not a rule of property as contended for by petitioner. If it is not a rule of property it seems to respondents that the Circuit Court of Appeals was eminently correct in its opinion. Therefore this claim of petitioner should be refused.

There appeared in respondents' brief on page 50 the statement that the petitioner had made a misrepresentation of fact. This was corrected in the transcript submitted to counsel and returned, it is inexcusable that the same now appears in the brief. Counsel apologized to attorneys for petitioner, who would not intentionally misrepresent any fact and who very readily forgave the error. Bad manners, as said by our President the other day need not beget bad manners. However attorneys for petitioners likewise were acrimonious in their reply brief filed on the day before submission. Likewise counsel expressed regret to respondents for the statements therein made and the matter was forgotten. We apologize to this Court for the statements in the brief because however it occurred it was inexcusable.

Respondents therefore respectfully pray the Court that the petition herein be refused and in the alternative, no matter what the Court's action be on the question of innocent purchaser, that the portion of petitioner's prayer with reference to the holding of the Circuit Court of Appeals in regard to the road be in all things refused as the Circuit Court of Appeals undoubtedly passed upon that issue in accordance with the laws and decisions of the State of Texas and with the

facts found by the trial court and the Circuit Court of Appeals.

Respectfully submitted,

Angus G. Wynne

ANGUS G. WYNNE,
Longview, Texas,
Attorney for Respondents.

A copy hereof has been furnished to David B. Trammell, Fort Worth, Texas and Clayton L. Orn, Fort Worth, Texas, Attorneys for petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 28.—October Term, 1939.

Cities Service Oil Company, Petitioner,
vs.
B. P. Dunlap, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 4, 1939.]

Mr. Justice McReynolds delivered the opinion of the Court.

This cause is here in order that we may decide whether the Circuit Court of Appeals wrongly declined to follow the rule of the Texas courts prescribing how and by whom the facts should be shown where one party to a contest concerning ownership of land claims the legal title as bona fide purchaser. We have considered that point only and conclude the ruling below was error. In consequence the challenged judgment must be reversed. The cause will be remanded for final determination upon the entire record consistent with this opinion.

Prior to 1899 Louisa Rogers owned a rectangular tract of land —320 acres—in Gregg County, Texas. In February of that year her heirs—J. F. Rogers and his three brothers—divided this by deeds, duly executed and recorded. One of these conveyed to J. F. Rogers sixty-eight acres out of the northwest portion of the tract, described by metes and bounds. The north line was said to begin at a specified point and to run thence west 440 yards to "Wiley Davis N. E. corner." There the boundary turns south and runs for eight hundred and eighty yards, thence east, &c. Measured on the ground, 440 yards ends sixty-six feet east of Davis' corner. This discrepancy gave occasion for the present controversy over the sixty-six foot strip lying between a south-line from Davis' corner and a parallel one sixty-six feet to the east. The interest asserted by respondents rests upon the theory that by intention this was left undivided.

In 1930 J. F. Rogers' heirs granted an oil and gas lease to all land described in the 1899 deed to him. By assignments and succes-

sion, petitioner Oil Company became owner of this. The conveyances were duly recorded.

In 1934 respondent Dunlap obtained from the three brothers of J. F. Rogers and his heirs, a lease of the major part of the sixty-six foot strip above described. Title to this is the subject of the present controversy.

Claiming that the land described in the Dunlap lease of 1934 was within the boundaries of its earlier one (1930), petitioner filed an original bill in the United States District Court to remove the cloud. Dunlap and the Rogers appeared and denied the material allegations. A cross-bill set up their recorded deed and alleged that the call in the 1899 deed to J. F. Rogers for "Davis' northeast corner" was inserted through inadvertence and mistake; that the distance call controlled; that the purpose of the parties was to establish the western terminus of the north line sixty-six feet east of Davis' corner and leave a strip on the west in common ownership.

Petitioner denied the allegations of the cross-bill and asserted that it and its predecessors were purchasers of the recorded legal title for value in good faith and without notice of mistake.

The District Court ruled in favor of Dunlap. The Circuit Court of Appeals affirmed.

In the latter court petitioner maintained that under the established Texas rule, on an issue of bona fide purchaser for value without notice, the burden of proof is upon him who attacks the legal title and asserts a superior equity. It cited *White* v. *Hix*, (Texas) 104 S. W. (2d) 136, 139-140,[1] and insisted that *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, required observance of the local rule.

The court recognized the existence of the Texas rule as claimed but thought a different and better one was generally approved and should be followed. It said—

"In the present case the appellant is the original complainant, seeking a decree quieting its title. It has entered a court of equity,

[1] "It is thoroughly settled that one who claims a superior equitable title to land as against one who has purchased from the holder of the legal title must show that such purchaser did not purchase for value or purchased with notice of the outstanding equity. Teagarden v. R. B. Godley Lumber Co., 105 Tex. 616, 154 S. W. 973; Commonwealth B. & L. Ass'n. v. Howard (Tex. Civ. App.) 61 S. W. (2d) 546; Moore v. Humble Oil & Ref. Co. (Tex. Civ. App.) 88 S. W. (2d) 943, 944; Tarkenton v. Marshall (Tex. Civ. App.) 91 S. W. (2d) 473. The same rule applies in favor of lien holders. Texas Loan Agency v. Taylor, 88 Tex. 47, 29 S. W. 1037; McAlpine v. Burnett, 23 Tex. 649, 650." And see Ritch v. Jarvis, (Texas) 64 S. W. (2d) 831, 834-835.

asking equity and bound to do equity. The defendants in their answer set up a mistake, correctable in equity, in the partition deed made to complainant's grantor, J. F. Rogers. Complainant replies, denying the alleged mistake and alleging additionally in very general terms that it and its predecessors in title purchased in good faith, paying value for the oil and gas lease it holds in reliance on the deed as written, and without notice or knowledge of the claim now asserted that the call for the Wiley Davis northeast corner was inserted by mistake. There was no further pleading."

"Issue stands joined on the new facts alleged by this complainant's reply concerning its purchase for value without knowledge or notice. It seems to us that the burden of proving these facts ought reasonably to rest on the complainant, both because it has alleged them and they are essential to its success, and because they are peculiarly within its knowledge. . . . What the complainant itself paid, and with what knowledge, it of course knows and could easily prove. There is a failure of evidence, not only as to bona fides and want of notice, but as to what was paid and to whom, and when and how; the details of which the maker of this plea has from the earliest times been held bound to allege and, when put in issue, to prove."

"This seems to us a matter of practice or procedure and not a matter of substantive law. There is no question as to what are the rights of a bona fide purchaser, or as to whether the facts established make complainant out such, but only a question of how and by whom the facts shall be shown to the court. Such matters are not within the decision in Erie R. Co. *v.* Tompkins, and the cases following it."

"We have here not a case where a Texas statute has created the right asserted, or has created a presumption, or is in any manner to be applied as construed in Texas. The question is simply what is the proper practice in courts of equity. The practice followed in the State courts of Texas, where equity courts as such do not exist, is not controlling."

We cannot accept the view that the question presented was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely. Petitioner was entitled to the protection afforded by the local rule. In the absence of evidence showing it was not a bona fide purchaser its position was superior to a claimant asserting an equitable interest only. This was a valuable assurance in favor of its title.

Central Vermont Ry. v. *White*, 238 U. S. 507, 512, considered an analogous situation and pointed out the principle presently applicable. Proof that petitioner did not purchase for value and in good faith was "part of the very substance" of respondents' cause.

Sundry arguments advanced here to support respondents' demand for affirmance, notwithstanding the erroneous pronouncement below, will be matter for consideration when the cause comes again before the Circuit Court of Appeals.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.